

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.) Criminal Action
) No. 09-10017-GAO
)
TAREK MEHANNA,)
)
Defendant.)
)

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

DAY THIRTY-ONE
JURY TRIAL

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Friday, December 9, 2011
10:13 a.m.

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GREGORY JOHNSEN (Cont'd)

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MOHAMMAD H. FADEL

by Ms. Bassil	23
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1 (The following proceedings were held in open court
2 before the Honorable George A. O'Toole, Jr., United States
3 District Judge, United States District Court, District of
4 Massachusetts, at the John J. Moakley United States Courthouse,
5 One Courthouse Way, Boston, Massachusetts, on December 9, 2011.

6 The defendant, Tarek Mehanna, is present with counsel.
7 Assistant U.S. Attorneys Aloke Chakravarty and Jeffrey Auerhahn
8 are present, along with Jeffrey D. Groharing, Trial Attorney,
9 U.S. Department of Justice, National Security Division.)

00:19 10 THE COURT: Good morning, jurors, counsel. Mr.
11 Johnsen. Go ahead.

12 CONTINUED CROSS-EXAMINATION BY MR. GROHARING:

13 Q. Mr. Johnsen, I want to ask you about some of your
14 testimony yesterday. But before I do, I'd like to ask you to
15 avoid some of the lengthy discussion that we had yesterday, and
16 to make the most efficient use of the court's time, if you'd
17 agree -- I'm going to ask you questions, and I'm going to ask
18 you whether or not you agree with what I say or whether you
19 disagree with that. I would ask if you would just indicate yes
00:20 20 that you agree with what I've asked you or no, if that's what
21 the question calls for. Would you agree to do that?

22 A. To the best of my ability, certainly. We're talking about
23 a time that's --

24 Q. I think this is a good example. "Yes" would be a good
25 answer to that question or "no."

1 MR. CARNEY: Your Honor, I would make the same request
2 of the witness, please.

3 THE COURT: Well, okay. Let me just -- as I've done
4 with other witnesses who have been asked this same question, to
5 the extent an answer can be fairly answered yes or no, that's
6 fine, even though there might be more that could be said. To
7 the extent that a truthful answer requires some qualification,
8 you should let us know that it requires some qualification.

9 THE WITNESS: May I just say something real quick?
00:21 10 Sorry. It's just -- it's 20 years in a country of 25 million
11 people. It's very complicated. So I will absolutely try to
12 give you yes-or-no answers to the best of my ability.

13 Q. Thank you very much.

14 Now, yesterday -- and I want to make sure that I
15 understand this, and I want to make sure that the jury
16 understands this. You testified about a period from 1990
17 through 2001 where Osama bin Laden and members of al Qa'ida
18 were involved in setting up infrastructure and training camps
19 in Yemen. Do you remember that testimony?

00:21 20 A. Yes, I do.

21 Q. You described that as a period of heightened activity, I
22 believe, for al Qa'ida in Yemen; does that sound right?

23 A. No. Heightened activity does not.

24 Q. Heightened activity in the sense of setting up training
25 camps, movement to Yemen, that kind of thing, establishment of

1 an infrastructure in Yemen.

2 A. Yes, establishment of an infrastructure, yes.

3 Q. Okay. And then you said that September 11th happened, and
4 that was a game changer, I think is the word you used.

5 A. Yes.

6 Q. At that point, members of al Qa'ida began being rounded up
7 and arrested and essentially went on the run, is that fair?

8 A. Yes.

9 Q. Okay. And you talked about the -- a drone strike that
00:22 10 took out the leader of al Qa'ida in Yemen in November of 2002?

11 A. Correct.

12 Q. Do you recall talking about that --

13 A. Yes, I do.

14 Q. -- that drone strike?

15 You described it as a decapitation strike?

16 A. That was one of the descriptions, yes.

17 Q. You would agree with me that it was an effective strike in
18 the sense that it decapitated the leader of al Qa'ida in Yemen?

19 A. Yes.

00:22 20 Q. And I believe you said that at that point -- and let me
21 know if this is not your accurate testimony or if you misspoke
22 yesterday. But you said that the November 2002 strike really
23 broke the back of al Qa'ida. They had been on the run up to
24 that point. That was the strike, it was a decapitation strike.
25 It killed their leader, and they didn't know what to do after

1 that. They had been struggling to reorganize even when he was
2 in charge. And now with him dead, the organization really
3 crumbled. Does that sound right?

4 A. Yes.

5 Q. You stand by that testimony?

6 A. Yes. The organization started to crumble even more so
7 after the strike in 2002, that's correct.

8 Q. You testified yesterday about the fact that you write a
9 lot?

00:23 10 A. That's correct.

11 Q. You publish articles?

12 A. Yes, I do.

13 Q. And you provide your opinion in those articles?

14 A. Yes, I do.

15 Q. Are you familiar with an article you wrote in -- on April
16 12, 2010?

17 A. Could you remind me of the title?

18 Q. It's called, "An Act of Futility. Obama wants to
19 assassinate the radical Yemeni cleric Anwar al-Awlaki. The
00:24 20 thing is, his murder would do more harm than good."

21 A. Yes, I'm aware of that.

22 Q. Anwar al-Awlaki at that point was a member of al Qa'ida in
23 the Arabian Peninsula?

24 A. There was some debate as to his exact membership within
25 the organization. It was suspected.

1 Q. No doubt he was a member of al Qa'ida?

2 A. It was suspected there was some -- there was some
3 ambiguity.

4 Q. He was putting out propaganda on behalf of the
5 organization, right?

6 A. By that point, it was still unclear whether he was --
7 whether he was a member. There were links, but membership is a
8 very technical term within al Qa'ida in the Arabian Peninsula.

9 Q. Well, you're an expert?

00:24 10 A. That's correct.

11 Q. Is it your testimony that he was not a member?

12 A. No. My testimony is that there was ambiguity and that
13 membership means swearing what's called a Bay'ah or an oath of
14 allegiance to Nasir al-Wihayshi. And there wasn't firm
15 evidence that he had done this.

16 Q. Fair to say he was speaking out espousing the views of al
17 Qa'ida and providing support for al Qa'ida publicly at that
18 point?

19 A. By 2010, he was, yes.

00:25 20 Q. I want to get back to this article where you were
21 advocating that the United States should not target him, right?
22 That was kind of the premise of this article?

23 A. That's slightly misleading. The premise of the article,
24 and my argument all along --

25 Q. Yes or no. Was the premise --

1 A. That was slightly misleading.

2 Q. And I certainly don't mean to mislead you. I'm reading
3 the title.

4 A. Right. I don't write the titles.

5 Q. You didn't right "An Act of Futility"?

6 A. No, I did not, not the title. I wrote the article.

7 Q. Someone else decides what to call your article?

8 A. That's commonly what's practiced, yes.

9 Q. I want to ask you about some specific texts that -- you
00:25 10 wrote everything that's actually in the article?

11 A. In the article, yes.

12 Q. Every word that's in here, you're responsible for?

13 A. Yeah.

14 MR. CARNEY: Your Honor, I object to the relevance of
15 what's happening in 2010 or 2011.

16 MR. GROHARING: It's about to become relevant, your
17 Honor.

18 THE COURT: Well, let's see. Okay. Go ahead.

19 Q. And did you say, in fact, referring to a missile strike on
00:26 20 Anwar al-Awlaki, "This has been done before to little effect.

21 In November 2002, a CIA drone killed Kamal Derwish, a Qa'ida
22 suspect with joint U.S.-Yemeni citizenship. Derwish was killed
23 because he was riding in a car with Abu Ali al-Harithi, a man
24 one U.S. diplomat at the time called 'The Godfather of al
25 Qa'ida in Yemen.' Ultimately, their deaths meant little. Al

1 Qa'ida was hobbled for a while, but eventually resurrected
2 itself stronger and more durability than its previous
3 incarnation." Those are your words, right?

4 A. Yes, they are.

5 Q. That al Qa'ida was hobbled?

6 A. Yes.

7 Q. English is your native language? You speak a number of
8 languages, right?

9 A. Yes. English is my native language.

00:27 10 Q. And the word "hobbled" certainly doesn't mean the same
11 thing as "crumbled," correct?

12 A. No, it does not.

13 Q. I want to talk a little bit more about what happened with
14 al Qa'ida in Yemen after that point. You testified yesterday
15 that -- notwithstanding the increased efforts, there were a
16 number of attacks in Yemen after September 2001?

17 A. Could you be more specific with the number of attacks?

18 Q. Do you recall testifying about attacks in Yemen?

19 A. There were attacks after September 11, 2001, in Yemen,
00:27 20 that's correct.

21 Q. Okay. And the organization was on the run, is what you
22 testified to?

23 A. Yes.

24 Q. Members of al Qa'ida were on the run?

25 A. Yes.

1 Q. And a number of them were rounded up?

2 A. Yes.

3 Q. Now, in -- you testified that in 2006 there was a jail
4 break?

5 A. That's correct.

6 Q. And it was at that point that al Qa'ida ultimately
7 established a leadership structure in Yemen and became more
8 effective, correct?

9 A. They reestablished, resurrected themselves.

00:28 10 Q. And, ultimately, they became quite active again in Yemen?

11 A. Yes, they did.

12 Q. When they resurrected themselves, they took members from
13 prison as well as other members and supporters that were
14 present either in Yemen or somewhere around the world that
15 joined them in their continued efforts against targets in Yemen
16 and in the region?

17 A. It was a very slow process initially, but, yes, they
18 acquired new members.

19 Q. And they ultimately became, first, al Qa'ida in Yemen and
00:29 20 now al Qa'ida in the Arabian Peninsula?

21 A. Eventually. There were some other incarnations of names
22 along the way.

23 Q. There was a little back and forth because there were
24 people in Saudi Arabia as well that were establishing an al
25 Qa'ida branch, and, ultimately, the al Qa'ida members in Saudi

1 Arabia joined with those in Yemen?

2 A. That's a little misleading as well.

3 MR. CARNEY: I --

4 A. I would be happy --

5 THE COURT: Wait, wait a minute. Mr. Carney has, I
6 think, an objection.

7 MR. CARNEY: Yes, sir. I have an objection to inquiry
8 about al Qa'ida now or 2010 or in a period that is not focused
9 on 2001 until 2006. After 2006, I submit it's not relevant to
00:29 10 this case.

11 MR. GROHARING: Well, the defendant is certainly
12 continuing to act, it's the government's contention, in support
13 of al Qa'ida after 2006. So --

14 THE COURT: Well --

15 MR. GROHARING: The organization and parts of the
16 organization's ongoing efforts are certainly relevant. I only
17 have a few more questions.

18 THE COURT: I think the present generally is not
19 relevant. To the extent that some arc of development might be
00:30 20 relevant, I guess you can have a span of years. But generally,
21 I think, beyond 2007 is not relevant.

22 Q. Well, fair to say that al Qa'ida in Yemen -- and you're an
23 expert on al Qa'ida in Yemen, correct?

24 A. (Nodding.)

25 Q. They have been very aggressive in producing and publishing

1 propaganda?

2 A. From what point?

3 Q. Well, once they were established --

4 A. This is after 2006?

5 Q. After 2006. After the jail break. They became
6 established. Infrastructure in Yemen. After that point, they
7 became aggressive in their use of propaganda?

8 A. In early 2008, they established the media wing al-Malahem.
9 From that point, from January 2008 on, they became very
00:31 10 aggressive.

11 Q. And the purpose of that propaganda was to recruit new
12 members?

13 MR. CARNEY: I object, your Honor.

14 THE COURT: Sustained.

15 Q. Are you familiar with the purpose of propaganda efforts of
16 al Qa'ida in Yemen?

17 MR. CARNEY: I object, your Honor.

18 THE COURT: Well, it was the date that was the
19 problem.

00:31 20 MR. CARNEY: Yes. And I believe he's talking about
21 after January of 2008.

22 THE COURT: Right. That's why the objection was
23 sustained.

24 MR. CARNEY: I'm objecting again to this --

25 THE COURT: Right.

1 MR. CARNEY: You've already --

2 THE COURT: I'm effectively doing that.

3 MR. CARNEY: Excuse me.

4 MR. GROHARING: Could we just go to the sidebar
5 briefly?

6 MR. CARNEY: I've had problems like this before, your
7 Honor.

8 (SIDEBAR CONFERENCE AS FOLLOWS:

9 MR. GROHARING: He's an expert on al Qa'ida in Yemen.
00:32 10 This is a specific example perhaps. He can testify about the
11 importance of propaganda in general as an expert on al
12 Qa'ida in Yemen. I have a couple more questions. I want to
13 ask him about the importance of propaganda and al Qa'ida uses
14 of it. It's well within his area of expertise.

15 THE COURT: Well, if that -- if the emphasis that he
16 would give or that you would give him by the questions is 2008
17 on, then all we know is that in that period, 2008 on, they had
18 an emphasis on propaganda. If, more generally, he would say,
19 throughout their existence from 1990 or from 2001 or pick any
00:33 20 other date that would be more relevant to the dates involved in
21 the case, that would be a different matter. But you
22 specifically focused him on post events. So it could be true
23 that they have emphasized propaganda in 2008 but did not before
24 that. He's got to be able to say they did it before that.

25 MR. AUERHAHN: It's not just the issue of al Qa'ida in

1 Yemen's emphasis on propaganda but his, as an expert on
2 analyzing an al Qa'ida affiliate, beliefs that propaganda is a
3 very important tool of al Qa'ida, which, seems to me,
4 consistent with what Kohlmann said and inconsistent with some
5 of the representations of what some of their experts are going
6 to say, as a general matter, the importance of propaganda.

7 MR. CARNEY: I wonder if I could weigh in on this?
8 Number 1, your Honor, it's beyond the scope of the direct
9 examination because I never discussed propaganda.

00:33 10 THE COURT: Nobody ever observes that rule.

11 MR. CARNEY: Second of all the --

12 MR. GROHARING: He's an expert of al Qa'ida. Excuse
13 me, J.

14 MR. CARNEY: Secondly, your Honor, he is not proffered
15 as an expert in propaganda.

16 THE COURT: Well, no, but he is -- no.

17 MR. CARNEY: Nor is he knowledgeable about the impact
18 of propaganda.

19 THE COURT: He said he's an expert on al Qa'ida in
00:34 20 Yemen. To the extent that what they do is propaganda, I think
21 it's probably within what he's described as --

22 MR. CARNEY: He may be able to describe what
23 propaganda he would be aware of, but he's not an expert on what
24 impact that propaganda would have on people.

25 MR. GROHARING: It's their use of the propaganda, your

1 Honor.

2 MS. BASSIL: Let me add --

3 THE COURT: The problem was, I think that it was --
4 the questions were directing him to a period which is beyond
5 the period that we're concerned with. If it can be --

6 MS. BASSIL: Let me add --

7 THE COURT: -- brought back to the relevant period,
8 then you can have it.

9 MS. BASSIL: I want to add a practical note to this.

00:34 10 When Jay stood up and said this was in 2008 and it really isn't
11 relevant, everybody on the jury nodded. This jury has heard
12 enough. These cross-examinations --

13 MR. CARNEY: They were agreeing with his Honor. I
14 notice a number of people nod when he speaks.

15 MS. BASSIL: It's time to move on.

16 . . . END OF SIDEBAR CONFERENCE.)

17 MR. GROHARING: May I continue, your Honor?

18 THE COURT: Yes.

19 Q. Again, Mr. Johnsen, you are here as an expert on al Qa'ida
00:35 20 in Yemen, correct?

21 A. I believe so, yes.

22 Q. And in that expertise, you've been able to study the use
23 of propaganda by al Qa'ida in Yemen, is that correct?

24 A. Yes.

25 Q. And, in fact, al Qa'ida in Yemen uses that propaganda

1 aggressively?

2 A. Aggressively, yes.

3 Q. And you've said that the more successful and vocal the
4 group is, the more recruits who want to join; do you recall
5 making that statement?

6 A. You have to remind me on where I made it.

7 MR. GROHARING: May I approach, your Honor?

8 THE COURT: You may.

9 A. Yes.

00:36 10 Q. Are you familiar with that article, sir?

11 A. Yes, I am.

12 Q. Did you, in fact, make that statement?

13 A. Yes. Not -- sorry. Yes.

14 Q. Again, could you just remind the Court what was that
15 statement? I believe it's in bold letters on the page there.

16 A. You want me to read the bold or the highlighted?

17 Q. The bold, please.

18 A. "The more successful and vocal the group is, the more
19 recruits who want to join."

00:36 20 Q. Thank you.

21 MR. GROHARING: That's all I have, your Honor.

22 MR. CARNEY: May I have one moment, please?

23 THE COURT: Okay.

24 MR. CARNEY: Your Honor, I have one question. May I
25 ask it from here?

1 THE COURT: Go ahead.

2 REDIRECT EXAMINATION BY MR. CARNEY:

3 Q. Mr. Johnsen, is there --

4 THE COURT: No. Go ahead.

5 Q. Mr. Johnsen, is there any evidence of al Qa'ida training
6 camps in Yemen from November of 2001 until February of 2006?

7 A. No, there is not.

8 MR. CARNEY: Thank you. Thank you, your Honor.

9 THE COURT: Sir, thank you. You may step down.

00:37 10 MS. BASSIL: Your Honor, our next witness would be
11 Doctor Mohammad Fadel.

12 MR. CHAKRAVARTY: Your Honor, there are a couple of
13 issues.

14 THE COURT: Let me see you briefly at the side. We
15 may have to --

16 (SIDEBAR CONFERENCE AS FOLLOWS:

17 THE COURT: We had talked yesterday about the
18 government's submission and so on and we left it that we would
19 see whether there could be an accommodation of minds.

00:38 20 MS. BASSIL: We focused Mr. Chakravarty on the
21 specific pieces within the threads I was going to use.

22 THE COURT: Has that been successful?

23 MR. CHAKRAVARTY: Well, the government disagrees it's
24 been successful. It was appreciated. But there was no
25 commitment to say we're not going to be introducing 70 posts.

1 It was, rather, I'm going to focus on a few things, and if I
2 need to, then I'll go to others.

3 THE COURT: Let's start with the few things. So we're
4 limited to the "few things."

5 MR. CHAKRAVARTY: Which are Tibyan posts. The
6 government's position is Tibyan posts which are about the
7 validity of Jihad, that target that kind of thing, that seems
8 fair game. That's relevant state of mind. I think it's
9 cumulative and duplicative, but that's a separate issue.

00:38 10 But there are other Tibyan posts about the citizenship
11 amongst the five or six that the defense seeks to offer through
12 the witness. Citizenship, about --

13 THE COURT: I don't understand that, the value of
14 citizenship. Is this Aman, are we talking about?

15 MS. BASSIL: No.

16 THE COURT: What is the value of citizenship?

17 MS. BASSIL: It's a couple of things. The value of
18 citizenship has to do with Muslims who run for office, someone
19 who puts the United States flag on a CD of a Qur'an.

00:39 20 THE COURT: Is this within the scope of the
21 pretrial --

22 MS. BASSIL: Yes.

23 THE COURT: -- supplemental?

24 MS. BASSIL: Yes. It's in contrast to the sort of
25 views al Qa'ida has. So it's -- like Doctor March did it, but

1 it's on other subjects.

2 MR. CHAKRAVARTY: I don't think it is within here.
3 Actually, I say citizenship. There's citizenship, voting,
4 justification for takfir for those who don't pay the annual
5 zakat or tithes. There were discussions about a scholar who
6 the jury has not heard anything about. There are just
7 discussions about what he thinks is a good -- being a good
8 Muslim.

9 The government's position is they weren't not only not
00:40 10 disclosed, but this witness is an Islamic -- he's a religious
11 expert in Islam. He talks about the history of Islam, which is
12 part -- I'm not sure that's relevant at all. But holding that
13 aside, just going through the resume, there's nothing
14 indicating he knows anything about al Qa'ida. There's no
15 scholarly research on al Qa'ida. And to the extent he's going
16 to talk about, as March kind of back-doored it, I know al
17 Qa'ida without --

18 THE COURT: That might be true. That might be a
19 limitation.

00:40 20 MS. BASSIL: Let me explain who he is. He teaches at
21 the University of Toronto Law School. He's an expert in
22 Islamic law, religion and theology jurisprudence and writings,
23 religion. And as part of that, he certainly reads and is very
24 familiar with statements by al Qa'ida and how those relate to
25 sort of al Qa'ida's religious justifications and where those

1 have been distorted by al Qa'ida. And that's what he's going
2 to talk about, and he's going to contrast or compare writings
3 that the defendant has posted.

4 MR. CHAKRAVARTY: That's exactly the type of
5 disclosure. The basis of that opinion, we don't have. In his
6 resume, there's zero al Qa'ida --

7 THE COURT: Okay. I don't think that's a particular
8 problem. I'll allow that. My concern is the number of
9 exhibits.

00:41 10 MS. BASSIL: Very few exhibits, all right? And what I
11 will say about this, I'm perfectly willing -- I included the
12 whole thread out of an abundance of caution. I am certainly
13 willing to redo the exhibits that go to the jury and just put
14 in that particular piece. I'm perfectly willing to do that.

15 THE COURT: Okay. I think we can go ahead.

16 MS. BASSIL: Thank you.

17 THE COURT: Let me just clarify one thing. I asked
18 about the supplemental disclosure. That is distinguished from
19 the revised one filed yesterday. The operative disclosures
00:42 20 will be the supplemental ones. To the extent that the revised
21 ones add material that were not disclosed pretrial, that is not
22 going to be permitted. So the focus --

23 MS. BASSIL: It's in response to Kohlmann.

24 THE COURT: The operative expert disclosure on the
25 scope will be the October 18th filings. Just so you know --

1 MS. BASSIL: I want to make an offer of proof on that.
2 The Court has always known that our experts were based on what
3 Kohlmann was going to say and that we certainly didn't know
4 exactly what he was going to say.

5 THE COURT: Well, I don't think that you can disclose
6 a scope and then revise it substantially. Minor revisions.

7 MS. BASSIL: I was told to revise Sageman.

8 THE COURT: Not the second one; the first one. But,
9 anyway, the pretrial disclosures serve the purpose of Rule 16,
00:43 10 and those will be the basis for the scope of the inquiry.

11 MR. CHAKRAVARTY: Your Honor's -- I think the mutual
12 understanding with regards to the fact of not commenting on the
13 defendant's state of mind and --

14 THE COURT: Right, right.

15 MR. CHAKRAVARTY: Those pretrial disclosures.

16 THE COURT: Right.

17 . . . END OF SIDEBAR CONFERENCE.)

18 MS. BASSIL: Your Honor, we call Doctor Mohammad Fadel
19 to the stand, please.

00:44 20 MOHAMMAD H. FADEL, Sworn

21 THE CLERK: Please be seated. State your name. Spell
22 your last name for the record. Keep your voice up and speak
23 into the mic so everyone can hear you.

24 THE WITNESS: Mohammad Hossam, H-o-s-s-a-m, Fadel,
25 F-a-d-e-l.

1 THE COURT: Will you pull the microphone a little
2 closer to you, sir, so that we're sure we're hearing you well.

3 THE WITNESS: Is that okay?

4 MS. BASSIL: Speak up just a little bit.

5 THE WITNESS: Certainly.

6 DIRECT EXAMINATION BY MS. BASSIL:

7 Q. Will you tell the jury your full name and occupation?

8 A. Mohammad Hossam Fadel. I'm an associate professor of law
9 at the University of Toronto Faculty of Law where I teach
00:45 10 varies classes, including Business Organizations; Trusts; The
11 Law of International Business and Finance Transactions; and
12 Religion, Liberalism and the State, The Case of Islam.

13 I was formerly a practicing attorney in New York City.
14 I continue to be a member of the bar in good standing in New
15 York.

16 Q. Will you tell the jury your educational and professional
17 background beginning with your graduation from college?

18 A. I graduated from the University of Virginia College of
19 Arts and Sciences in 1998 with a degree of high honors, high
00:45 20 honors in Government and Foreign Affairs. I then studied
21 Arabic for a year at the American University of Cairo, pursuant
22 to what's known as a Casa Fellowship. Then I returned to the
23 United States, where I began a Ph.D. program at the University
24 of Chicago. I completed that -- I was awarded my Ph.D. in
25 1995.

1 Q. What were you awarded your Ph.D. in?

2 A. Near Eastern Languages and Civilizations. I wrote my
3 dissertation on a topic on medieval Islamic law dealing with
4 deregulation of courts.

5 Subsequent to completing my Ph.D., I began my J.D., my
6 doctorate of law degree, at the University of Virginia Law
7 School in the fall of 1996. I graduated in 1999 with honors.
8 And then I did two clerkships with different federal courts.
9 And then I began private practice at a law firm in New York
00:46 10 with the name of Sullivan and Cromwell. I stayed there for
11 five years -- almost five years as a corporate associate.

12 Q. And then you left being a lawyer and became an academic?

13 A. Well, I'm always a lawyer. I'm still a lawyer. I no
14 longer practice law. But I am an academic lawyer now.

15 Q. What is your rank at the Faculty of Law at the University
16 of Toronto?

17 A. As of July 2011, I became an associate professor, which
18 means I receive tenure. So I was promoted from assistant
19 professorship to associate professor.

00:46 20 Q. Of the classes you teach, do any of them focus on Islam or
21 the role of religion?

22 A. Yes. I teach a seminar called Liberalism, Religion and
23 the State in the Case of Islam. That is a class in what I like
24 to call applied political philosophy. We look at how various
25 liberal political philosophers think about the role of religion

1 in a democratic state with a particular focus on John Rawls.

2 What we then do is study various freedom of religion
3 cases in different liberal jurisdictions, including the United
4 States, Canada, and Western Europe, and we look at the issues
5 that have come up with respect to Muslim minorities living in
6 Western democracies.

7 Q. In teaching and in -- well, in teaching on this subject,
8 do you stay abreast of communications by al Qaeda and other
9 Muslim terrorist groups?

00:47 10 A. I do. It's not the primary focus of my research, but it's
11 something that, obviously, I run into all the time in the work
12 that I do.

13 Q. Do you speak, read, and write Arabic?

14 A. Yes, I do. I speak Egyptian colloquial fluently. I speak
15 classical Arabic fluently. I read classical Arabic fluently.

16 Q. What is your scholarly area of expertise?

17 A. My scholarly area of expertise is Islamic law. I've
18 written numerous articles in Islamic legal history, covering
19 topics dealing with judicial procedure, rule of law, family law
00:48 20 in the modern world and in the premodern world. I've written
21 articles on issues dealing with the role of women's rights in
22 premodern Islamic law.

23 My current area of research focuses almost entirely on
24 intersections between Islam and liberalism, primarily areas of
25 overlap and overlaps of tension. And in areas of tension, I've

1 written -- so then I've written on issues regarding female
2 citizenship, modern Islamic reform movements, issues dealing
3 with --

4 Q. Speak up a little.

5 A. Sorry. I've written on primarily issues that arise out of
6 Islamic law and its relationship with liberal citizenship.

7 Q. Do you have a scholarly area of expertise in Islamic
8 theology and theological history?

9 A. Yes. One of my more recent articles, called "The True,
00:49 10 the Good and the Reasonable" deals with the theological
11 resources available in Orthodox Islam to promote a conception
12 of -- an Islamic-based conception of citizenship. So I'm very
13 familiar with the premodern Islamic theological tradition.

14 Q. Now, you said that you've published. Have you published
15 in peer-reviewed journals?

16 A. Yes. I've published numerous articles in peer-reviewed
17 journals from the time I was a graduate student until the
18 present day. My first peer-reviewed journal was a translation
19 and commentary on a medieval work of Hadith. There's been a
00:49 20 lot of discussion of Hadith. Hadith is a very technical
21 science. My very first article was on that subject. But as
22 I've said, I write widely on a variety of areas in
23 peer-reviewed journals.

24 Q. By the way, did you peer-review Andrew March's book?

25 A. Yes, I did.

1 Q. Did he know at the time that you were one of his peer
2 reviewers?

3 A. No, he did not.

4 Q. Have you also written chapters for scholarly books?

5 A. Yes. Again, I've written several chapters for scholarly
6 books.

7 Q. Without giving us the exact title, can you just give us
8 the general range of topics?

9 A. Again, I've written on Islamic family law in the liberal
00:50 10 setting. I've written on certain theological doctrines that
11 were developed in the modern world which are intended to create
12 more -- a more inclusive sense of community. I've written on
13 also narrow -- very narrow technical theological topics as
14 well.

15 Q. Have you published any articles for scholarly
16 encyclopedias?

17 A. Again, I've written numerous articles, too many to
18 recount, for various different scholarly encyclopedias. I do
19 think the one that's worth highlighting is, about two years ago
00:50 20 I was commissioned to write a lengthy article on the history of
21 the Islamic law of international conflict for the Max Planck
22 International Encyclopedia of Public Law.

23 Q. Can you summarize your lecturing and teaching experience?

24 A. It's very hard to summarize my lecturing experience
25 because it's too extensive. But in terms of teaching, prior to

1 law school, I taught Arabic in various different programs. I
2 taught Arabic at Notre Dame as an adjunct instructor. I taught
3 Arabic at the Middlebury Summer Language Institute. I taught
4 Arabic as an instructor at the University of Virginia. I also
5 taught, as an adjunct instructor, in the Department of
6 Government --

7 Q. You've got to slow down and speak up.

8 A. Sorry. Before I went to law school, I taught Arabic as an
9 adjunct instructor at Notre Dame University for one semester.

00:51 10 I then taught Arabic at Middlebury College, Summer Arabic
11 Program, for the summer of 1993. Then I taught as an
12 instructor full time at the University of Virginia, Arabic, in
13 the year 1994 and 1995. Then I taught as an adjunct instructor
14 in the Department of Government and Foreign Affairs at the
15 University of Virginia in Medieval Islamic Political Theory.

16 Then I went to law school. I did not teach again
17 until 2006. So I've already mentioned about the courses I
18 teach at the University of Toronto Law School. I've also
19 taught Islamic Law intensive classes at Notre Dame Law School
00:52 20 and University of Virginia Law School. And I also taught an
21 intensive course on Islamic Finance at the National University
22 of Singapore two summers ago.

23 Q. Are you a United States citizen?

24 A. Yes, I am.

25 Q. Why are you teaching in Canada?

1 A. I happened to receive a very good offer at a very good law
2 school.

3 Q. Have you given any papers or presented on the issues of
4 Jihad?

5 A. Yes, I have. A couple of years ago, I was invited to a
6 workshop at Syracuse Law School. They have a center there for
7 National Security Law. I gave a paper there about the status
8 of the law of Jihad in the modern period and the legally
9 problematic nature of that doctrine.

00:53 10 Q. Have you appeared on various media outlets or media
11 programs?

12 A. Yes, I have. I appear routinely on various news programs
13 in Canada, and just a few -- just a few days ago, I was on an
14 NPR show.

15 Q. Have you testified in court -- have you been -- have you
16 testified in a court before?

17 A. Yes, I have.

18 Q. Where was that?

19 A. I testified in the Eastern District of Virginia either in
00:53 20 2006 or 2007. I testified in Canada on two different occasions
21 in criminal cases.

22 Q. In Canada, were you asked to testify by the -- was there
23 any situation where you were asked to testify by the court
24 itself as opposed to the prosecutor or the defense?

25 A. I don't -- I don't know the details of Canadian procedural

1 law. But, in general, Canadian law requires the expert to
2 affirm that they're giving the evidence for the benefit of the
3 court. But in both -- well, in one case, I was solicited by
4 the Crown. That's what they call the government in Canada. In
5 one case, I was solicited by the defense. Then in another
6 civil case, I recently gave -- I guess about a year ago, I gave
7 a long affidavit on the status of polygamy in Islamic law to
8 assist a court in British Columbia.

9 Q. What is your connection to this case or your involvement
00:54 10 in this case?

11 A. I was contacted several months ago, I believe probably in
12 June. I was given, I think, a copy of the Complaint, some
13 affidavits, some things relating with bail hearings. I
14 reviewed those. And I reviewed a couple of -- I think maybe
15 some IMs. I don't recall exactly. But I was contacted by the
16 defense team and asked if I would look at these things and if I
17 had anything of value to contribute.

18 Q. What have you reviewed?

19 A. A lot of material. I reviewed over 2,000 pages of IMs,
00:55 20 hundreds of pages of Tibyan postings. I've reviewed Mr.
21 Mehanna's personal blog entries, and I think I might have seen
22 some emails. I'm not entirely sure.

23 Q. Is it your opinion that a full understanding requires an
24 understanding of Islamic theology, history and law?

25 MR. CHAKRAVARTY: Objection, your Honor.

1 THE COURT: Sustained to the form of the question.

2 Q. Let me rephrase that. Doctor Fadel, did you feel you had
3 something to offer in this case?

4 A. Yes, I did.

5 Q. Could you explain why you felt you had something to offer?

6 A. Yes, because I think much of the material in evidence
7 involves technical discussions --

8 MR. CHAKRAVARTY: Objection, your Honor. The witness
9 doesn't know what the evidence is. He's testifying to the
00:55 10 materials he's received from the defense.

11 Q. Have you reviewed transcripts of this trial?

12 A. Yes, I have.

13 Q. Are you aware of what the evidence is?

14 A. Yes.

15 Q. Most of it?

16 A. Generally speaking, yes.

17 Q. Would you --

18 THE COURT: Go ahead.

19 Q. Would you please continue?

00:56 20 A. Yes. Much of the evidence entails technical discussions
21 of Islamic theology and law, and so I felt that I could aid the
22 Court and the jurors to understand that material better if I
23 explained what it meant.

24 Q. Would you tell the jury what theology is, what Muslim
25 theology is?

1 A. Muslim theology is the study of doctrines that a Muslim
2 and really all human beings are required by their creator to
3 believe. So it's a doctrine of truth.

4 There are sort of basic doctrines that all Muslims are
5 expected to believe: namely, the oneness of God; that the
6 Prophet Muhammad is his last messenger; that God sends prophets
7 to humanity to teach them right from wrong; God relieves his
8 will in holy books that contains his instructions to humanity;
9 and that after we die God will resurrect us and hold us
00:56 10 accountable on the day of judgment.

11 Q. What are -- can you explain to the jury what is the
12 intersection between Islamic religion and Islamic law?

13 A. Yes. Because a court doctrine of Islamic theology is that
14 God reveals laws to human beings through prophets. Islamic
15 law, in a very important sense, a religious law or revealed
16 law. So Muslims believe that the rules that govern human
17 beings lives, in a very important sense, come from God's will.
18 So there's always an intersection between belief and a specific
19 rule. So there's an element when somebody says, for example,
00:57 20 prayer -- a Muslim must pray five times a day, that's both a
21 theological rule because we have to believe it; as a Muslim,
22 we're required to believe that to be true. But we're also
23 required to do it. So the action part, the conduct part, is
24 the law part. The belief part is the theology part. So
25 there's belief and there's conduct.

1 Q. Is there a definitive opinion or authority in Islamic
2 doctrine of religion and law?

3 A. Generally speaking, no. Islam does not have a final
4 arbiter on matters either of theological doctrine or legal
5 practice. Islam does not have an organized church.

6 Q. How is it determined what's right and what's wrong?

7 A. Through a tradition of debate and disputation. And that
8 tradition of debate and disputation has gone on for almost
9 1,400 years.

00:58 10 Q. I'm going to ask you -- well, what is a Fatwa, then?
11 Isn't that an opinion?

12 A. A Fatwa is an opinion by a qualified interpreter of his
13 belief of what God wants. It's only an opinion. It's
14 nonbinding. It only binds you if you believe it to be true.

15 MS. BASSIL: Your Honor, I'm going to be putting a
16 number of words up. Can we use the screen?

17 Q. You said -- I'm sorry. You said that this is an opinion
18 given by a religious figure?

19 A. A qualified religious figure, yes.

00:59 20 Q. Are you familiar with Osama bin Laden issuing Fatwas?

21 A. Yes, I am.

22 Q. Are those -- was he a qualified religious person to give
23 such an opinion?

24 A. In the opinion of most trained people, he would not have
25 qualified as a proper person giving a Fatwa.

1 MR. CHAKRAVARTY: Objection, your Honor. I think the
2 witness was asked whether he believed that.

3 A. No, I do not believe --

4 THE COURT: I think that was what he was asked. I
5 didn't understand the question that way. If you want to
6 clarify it, Miss Bassil.

7 Q. It's my understanding that Osama bin Laden issued Fatwas?

8 A. That's correct.

9 Q. Was he a legitimate person to have done that?

00:59 10 A. In my opinion, no.

11 Q. Now, I am going to ask you to do something, all right?
12 I'm going to give you four minutes, all right? Mr. Carney gave
13 Mr. March four minutes. I'm going to give you four minutes to
14 give the jury a history of Islam from 610 to the present.

15 MR. CHAKRAVARTY: Your Honor, I would object to the
16 relevance of the history.

17 THE COURT: Overruled. He may do it.

18 Q. Can you do it?

19 A. I'm going to try. Islam is an Abrahamic religion meaning
01:00 20 that it's part and parcel of -- it descends from the Patriarch
21 Abraham. So the Prophet Muhammad is considered by Muslims to
22 be a direct descendent of the Prophet Abraham through his son
23 Ismail from his servant girl Hajar.

24 So the Qur'an affirms all the Old Testament prophets.
25 It affirms the prophethood of Jesus. It also mentions some

1 other Arabian prophets that the Bible does not.

2 After the death of the Prophet Muhammad, Islam
3 expanded dramatically: east, west, north, and south, very
4 quickly forming a global and dynamic civilization with cities
5 throughout much of the ancient world. It continued more or
6 less to expand until the 19th Century when the gap between
7 Europe and the Muslim world became vast, and subsequently
8 Muslims came under European Colonial domination.

9 Q. I think you did it in less than four minutes.

01:01 10 MS. BASSIL: Could we have Exhibit 1178, please?

11 THE COURT: Is this your -- is this in evidence or
12 agreed to?

13 MR. CHAKRAVARTY: It's new. The government's
14 objection is relevance, your Honor.

15 MS. BASSIL: It's a map, your Honor.

16 THE COURT: All right. Other than that -- that will
17 be overruled. So we'll admit that. 1178.

18 (Exhibit No. 1178 received into evidence.)

19 Q. What does this map depict?

01:01 20 A. This map just depicts the geographical extent of the
21 Islamic world around the time of the 16th Century.

22 Q. Which part is Islamic?

23 A. More or less everything there except for the part in
24 Spain.

25 Q. And the parts in green are not?

1 A. The parts in green -- I'm sorry. The parts in green are
2 not, no.

3 Q. Now, you said that, as I understand it, Muhammad preached
4 in -- he preached in Saudi Arabia; that's where it started,
5 correct?

6 A. Yes, in what's now known as Saudi Arabia.

7 Q. At the beginning of Islam, what happened to the early
8 Muslims?

9 A. The early Muslim community was subject to great
01:02 10 persecution. The persecution was so intense that eventually
11 they were forced to leave their home town known as Mecca.

12 Q. Where did they go?

13 A. They went to the city that's now called Medina. That
14 event is called Hijra, or immigration.

15 MS. BASSIL: Your Honor, I'm going to go back to the
16 ELMO.

17 Q. That's Hijra, correct?

18 A. Correct.

19 Q. Now, when you showed us that -- when we looked at that map
01:02 20 of where Islam was, was this referred to as sort of the Golden
21 Age of Islam?

22 A. You could say that.

23 Q. What was going on in Islam compared to Europe?

24 A. Right. With the establishment of this new civilization,
25 we had a efflorescence of cultural activity. Cultural works

1 were being translated into Arabic from all the ancient
2 civilizations: Greek, Latin, as well as from Sanskrit and
3 Persian. And so a new sort of synthesis of global cultures was
4 arising and spreading throughout the Islam world: sciences,
5 literature, philosophy, et cetera, mathematics. This age was
6 sort of very important for the transition and pulling the
7 ground for modern civilization.

8 Q. In terms of what was going on in Europe, what period was
9 that known as?

01:03 10 A. It's more or less that period of time corresponding with
11 what we call in Europe the Dark Ages, when Europe was just
12 beginning to emerge from the collapse of the Roman Empire.

13 Q. Now, this Islamic world that -- where we had looked at in
14 the map, when did that end?

15 A. Again, I'm saying more or less around the 19th Century.
16 By that time, Muslim states had more or less lost their ability
17 to defend their independence against the rising power of
18 European powers.

19 Q. What was the Ottoman Empire?

01:04 20 A. The Ottoman Empire was the most important Islamic empire
21 in the western part of the Islamic world. So it extended
22 throughout North Africa, the Middle East, and also into Eastern
23 Europe, at its heyday. But by the 19th Century, it had come to
24 be called the Sick Man of Europe and was in retreat.

25 Q. After World War I, was the territory of the Ottoman Empire

1 carved up?

2 A. Yes. The Ottoman Empire was part of the central powers in
3 World War I. They were defeated, and upon their defeat, the
4 territories of the Ottoman Empire were divided into numerous
5 nation states under the protection either of Great Britain or
6 France.

7 Q. Were they colonies of Great Britain or France?

8 A. They were technically known as protectorates, but the
9 people who lived there sort of felt they were colonized and
01:05 10 resented it.

11 Q. Were those protectorates again broken up or changed after
12 World War II?

13 A. Not exactly the protectorates from the Ottoman Period.
14 But when we look at -- the Ottomans did not rule the entire
15 Islamic world. You can basically say that the rest of the
16 Islamic world had been outside of the Ottoman Empire, had been
17 divided into various numerous small states.

18 Q. Now, you used the term "Hijra." Does that have a meaning
19 in Islamic theology and law today?

01:05 20 A. Yes, it does. Hijra, although it was a historical event
21 describing the migration of the early Muslim community from
22 Mecca to Medina, later on came to be a very important
23 theological and legal doctrine.

24 Q. And did you see examples of this theological and legal
25 doctrine in Tarek Mehanna's writings?

1 A. Yes, I did.

2 Q. What did you see?

3 A. I saw --

4 MR. CHAKRAVARTY: Objection, your Honor. Summarizing
5 instances of --

6 THE COURT: Overruled. You may have it.

7 MR. CHAKRAVARTY: I also add, your Honor, there's no
8 mention of Hijra in the October 18th disclosure.

9 THE COURT: Overruled. Go ahead.

01:06 10 A. I saw numerous references to the concept of Hijra,
11 particularly whether Muslims living in the United States should
12 migrate to a Muslim country.

13 Q. Now, are you familiar with the Salafi aspect of Islam?

14 A. Yes, I am.

15 Q. We've had a lot of discussion about it. Can you explain
16 what it is?

17 A. Yes. The Salafi school of Islam is basically a
18 theological movement that began in the 18th century, or that's
19 when it became prominent, in the 18th century. Its most
01:06 20 important champion was a theologian that lived in Eastern
21 Arabia named Mohammed Abdel Wahab. He formed an alliance with
22 an Arabian tribe known as the al-Saud. So the
23 theological-political alliance later gave birth to what's known
24 today as the Kingdom of Saudi Arabia, where this alliance
25 remains firmly intact.

1 Q. Al-Saud became the royal family, correct?

2 A. That's correct. Now, that movement, its detractors call
3 it the Wahabi movement. They call themselves Salafis in honor
4 of the earliest three generations of Muslims, who all Muslims
5 acknowledge -- who all Sunni Muslims acknowledge as the best
6 Muslims. They're called the Salafi Fustar (ph), the pious
7 ancestors. So what distinguished them from other Muslim groups
8 was their insistence that all Muslim doctrine and practice has
9 to be rooted in the opinions of the first three generations of
01:07 10 Islam.

11 Q. And how -- you said that it started -- it was a theology
12 or an aspect of Islam that began as a 18th Century movement.
13 Did it come to other parts of the world from Saudi Arabia? And
14 when did that happen?

15 A. Yes, it did. It spread in various places. It wasn't --
16 it wasn't just Mohammed Abdel Wahab. Even before him, there
17 were some kinds of reformers like Shokani who lived in Yemen.
18 A group of theologians who began to emphasize returning to
19 revelation, Qur'an and Sunna, as opposed to the subsequent
01:08 20 tradition, as a source of networks.

21 So a network of the scholars that were in support of
22 this theological movement developed, and their influence spread
23 in Arabia but also, interestingly enough, in the Indian
24 Subcontinent.

25 Q. Did it come to the United States?

1 A. Yes, it did.

2 Q. When?

3 A. It came primarily in the last decade of the 20th Century.

4 Q. In the 1990s?

5 A. Yes.

6 Q. How did it come to the United States?

7 A. It came to the United States largely as a result of the
8 fact that Saudi Arabia continues to promote this brand of Islam
9 in its universities. American Muslims up to -- for the first,
01:08 10 let's say -- I don't want to get into too detailed a history of
11 American Islam, but you could say, for the first generation of
12 immigrant Muslims to the United States, it was a very
13 unsophisticated kind of Islam.

14 Over time, more and more American Muslims decided that
15 it was very important to have a more systematic and rigorous
16 understanding of their religion. Saudi Arabia was a very
17 convenient place to study. Saudi Arabia offered scholarships
18 to their universities. It was modern, it was comfortable.
19 Lots of Americans went there, studied Salafism, came back, and
01:09 20 began to teach it.

21 Q. Did Saudi Arabia send books and teachers and money for
22 centers here in the United States?

23 A. Yes, they did.

24 Q. What is the position of Salafism with respect to rulers?

25 A. Again, it's complicated. But the traditional position of

1 the Salafis has been one of almost absolute deference to
2 rulers.

3 Q. So, in part, was this the reason why the Saudi Royal
4 Family supported this?

5 A. I think that would be a safe inference.

6 Q. Now, the religious teachings of Salafism, I understand,
7 are to go back to the source, to go back to the Qur'an and the
8 Hadiths, correct?

9 A. That's correct.

01:10 10 Q. What are -- are there -- is there a very basic tenet to
11 it?

12 A. Well, I think the most important thing to understand about
13 Salafism is its concern, one might say obsession, with
14 doctrinal purity. They want -- so theology is much more
15 important to them than practice. I don't want to say that they
16 don't care about what people do, but, more fundamentally, it's
17 important for people to believe what they're supposed to
18 believe. So Salafism starts with theology and is very
19 concerned in teaching Muslims the proper doctrine about
01:10 20 everything.

21 Q. What are the Five Pillars of Islam?

22 A. The Five Pillars of Islam are: first, to testify that
23 there's no God except God, monomorphism, and that Mohammed is
24 his messenger; the second one is to pray five times a day; the
25 third one is to give charity; the fourth one is to fast during

1 the month of Ramadan between dawn to dusk; and then the fifth
2 one is to do pilgrimage to Mecca if one has the ability.

3 Q. Is Salafism or are Salafis political?

4 A. Again, generally, the answer is no because their general
5 view is that politics should be left to the rulers and that
6 individual Muslims should just cultivate knowing the proper
7 truth, theological truth, and living the most pious lives
8 possible.

9 Q. Are Salafis -- is Salafi a terrorist by definition?

01:11 10 A. Absolutely not.

11 Q. What is -- we've seen -- I'm going to ask you about some
12 words we've seen. What is Da'wah?

13 A. Da'wah is the process of inviting others to Islam and
14 teaching Muslims how to be better Muslims.

15 Q. When you say "inviting others to Islam," is Islam a
16 religion that encourages converts?

17 A. Yes. Islam believes itself to be a universal religion,
18 and it's an obligation on Muslims collectively to teach Islam
19 to others so they have an opportunity to become Muslims.

01:12 20 Q. I'm going to ask you -- and I'm going to really try to
21 pronounce this correctly, Kafir?

22 A. Kafir.

23 Q. Kafir. I'm going to ask you to explain Kafir and Kuffar.
24 What is Kafir?

25 A. Kafir just means a person who has not accepted Islam.

1 Kuffar is the plural. So it means non-Muslim.

2 Q. Is it ever used in a disdainful or sort of slang kind of
3 way?

4 A. Yes. It can be used derogatorily.

5 Q. When it's used derogatorily, how is it used?

6 A. Well, it's used to -- I guess to say, This person is not a
7 Muslim; so, therefore, his religion is bad. He's not as good
8 as us, right? And we need to sort of get him on board kind of
9 thing. That's one way.

01:12 10 But the circumstances in which it can be used in a
11 derogative fashion are really too broad to bring up here. It
12 can also be used just purely as a technical term, to say that
13 these rules apply to Muslims. They don't apply to non-Muslims.
14 It really depends on the context, whether the speaker intends
15 it in a derogatory fashion or in a technical sense that you
16 find in Islamic law books.

17 Q. We have seen the term or heard the term apostate. What
18 does that mean in terms of Islam?

19 A. An apostate is somebody who renounces Islam after having
01:13 20 once believed in it.

21 Q. What is an apostate ruler? We've also seen that.

22 A. A apostate ruler is a term of political -- modern Islamic
23 political thought that has emerged among certain theological
24 trends in the Islamic world. They accuse various Muslim
25 regimes of having committed apostasy because they do not rule

1 by Islamic law.

2 Q. Can you give an example?

3 A. The former president of Egypt, Hosni Mubarak, certainly;
4 the deceased former -- deceased leader of Libya, Moammar
5 Gadhafi. Those would be examples of apostate rulers in the
6 opinions of some Muslims.

7 Q. Now, who or what determines whether someone is an apostate
8 or an apostate ruler?

9 A. Right. These are two separate questions. In the easiest
01:14 10 case, where somebody who is formerly a Muslim or someone who
11 used to believe in Islam, announces, Formally, I no longer
12 believe in Islam. Then that's an express case of apostasy and
13 there's no problems. That's a very rare case, however.

14 The real issue, particularly in the modern community,
15 is whether or not individuals who claim to be Muslim have
16 committed an act of apostasy by way of conduct even if they're
17 unintending to be apostates.

18 So regimes, even like of the former president of
19 Egypt, Mubarak, or Gadhafi, themselves never claimed to
01:14 20 renounce Islam, right? So it's an accusation essentially.
21 Today, apostasy is usually hurled as an accusation, certainly
22 not as a legal finding, because in most Muslim countries,
23 apostasy is not a crime.

24 Q. Does that mean someone who is a convert but no longer --
25 I'm sorry.

1 When it was a crime -- when was it a crime to be an
2 apostate?

3 A. Well, in theory, in premodern Islamic law, apostasy was a
4 capital crime. It's very hard to know to what extent this was
5 applied with any kind of rigor. The more practical example of
6 apostasy was essentially people switching sides in war. That
7 was the core example of apostasy. In fact, if we look at the
8 Middle Ages, in the Crusader Wars, treaties that would be
9 entered into between Muslim states and the Crusader states who
01:15 10 have provisions for what they called renegades or apostates.
11 People would convert out of convenience, to join the other side
12 for a political gain. And then at the end of the war, they
13 would want to re-embrace their former religion. So apostasy
14 really arose in the Middle Ages to deal with those kinds of
15 situations.

16 Q. Does it mean that someone who is a convert but no longer
17 chooses to be a Muslim can be killed today?

18 A. There are certainly some Muslims who believe that. I
19 think the trend among modern Muslims is to deny that and say
01:16 20 that apostasy really should just be viewed as a kind of treason
21 in the battlefield and not a theological issue.

22 Q. We've seen the word and heard the word "Ummah." What is
23 an Ummah.

24 A. "Ummah" just means community. So in Islam, the believers,
25 people who adhere to Islam, form a brotherhood of belief, and

1 the name for that is Ummah.

2 Q. When you say they form a brotherhood of belief, does the
3 Ummah have geographical boundaries?

4 A. The Ummah has tangible geographical boundaries insofar as
5 the Muslim community has a tangible physical existence. But
6 it's really much more of a spiritual bond, and so Muslims treat
7 each other as brothers and sisters in a spiritual sense. And
8 so by adhering to the religion of Islam, Islam imposes upon
9 them certain mutual duties of support and obligations just by
01:17 10 virtue of sharing the same religion.

11 Q. Are you familiar with the concept of Jihad as it relates
12 to Islamic law and history?

13 A. Yes, I am.

14 Q. And can you tell us what that concept is as it relates to
15 Islamic law and history?

16 A. Yes. Jihad, in that form, is a noun. It's derived from
17 an Arabic verb which means to struggle. Generally, it means to
18 struggle for something positive or good. In the technical
19 sense, it means -- when I say "in the technical sense," I'm
01:17 20 talking about in Islamic law. In Islamic law, it is used as
21 the term for international -- for war -- international
22 conflict, excuse me. In Islamic moral discourse, it can be
23 used to describe somebody who's engaged in excessive ritual
24 observance in an effort to get closer to God. So somebody can
25 do Jihad in the sense of trying to draw near to God, but that's

1 in the context of pious rhetoric. In the context of Islamic
2 law, it means international conflict.

3 Q. In terms of the Qur'an and early words of Mohammed and The
4 Companions, did Jihad have a historical meaning?

5 A. Jihad in the Qur'an is largely used in the moral sense of
6 struggling for a good purpose. Now, of course, protecting the
7 community was the highest form, the highest kind of good
8 purpose. So it was used to describe the Muslims who were
9 fighting the polytheists at the time that were trying to
01:18 10 destroy the early community. So Jihad came to be used as the
11 paradigm of international conflict.

12 However, the Qur'an actually uses the term "Qital,"
13 which is a different term, Q-i-t-a-l, to specifically refer to
14 fighting. Because Jihad, as I said, is a more generic sense of
15 struggling to do good, fighting militarily for a religious
16 cause is, of course, a paradigmatic example of struggling for
17 something good. But the more narrow term for fighting in the
18 Qur'an is Qital, not Jihad.

19 Q. During the last ten-year period of Mohammed's life, was
01:19 20 the Qur'an focused on laws of war?

21 A. I wouldn't say it was necessarily focused on it, but it
22 was a very important topic. After the prophet and the early
23 community migrated to Medina, the pagans in Mecca didn't leave
24 them alone. And basically a war broke out between the two
25 sides, which only came to an end in the ninth year of the Hijra

1 when the Muslims triumphed over their enemies in Mecca.

2 Q. Was a system of law developed from this?

3 A. Yes. The Qur'an, from time to time, revealed rules
4 governing this conflict. Muslim jurists in later centuries
5 developed a fairly sophisticated body of governing the rules of
6 warfare based on the rules in the Qur'an, the practice of the
7 prophet, and the practice of the early community.

8 Q. Now, under the -- according to this body of law, who has
9 the authority to declare a war or a Jihad?

01:20 10 A. Again, it depends on the kind of war. But if it's a war
11 of choice, where the state is not -- where it's not an act of
12 self-defense, then only the legitimate ruler can declare a
13 Jihad.

14 Q. Can an individual declare Jihad?

15 A. In ordinary circumstances, absolutely not.

16 Q. In popular culture today, Jihad seems to mean violent
17 terrorist extremism, al Qa'ida blowing up buildings. Can you
18 explain this?

19 A. Well, I think it's complicated because, as I was
01:20 20 suggesting in my earlier answer, there are different kinds of
21 war that are recognized in Islamic law. The first kind of
22 Jihad is known as, we could say, a defensive war. In a
23 defensive war, anybody -- everybody who is the victim of an
24 attack by an invading non-Muslim force is under an individual
25 obligation to defend the territory from the invading

1 non-Muslims. In that circumstance, where it's a defensive
2 posture, no permission is needed.

3 Q. Is that common to other countries in war?

4 A. I presume that most states have their own conception of
5 legitimate self-defense, yes. Now --

6 Q. How did al Qa'ida change this?

7 A. Well, what al Qa'ida did was it appropriated the concept
8 of defensive war, which entails this individual obligation upon
9 Muslims to fight, and then tried to argue that Muslims in the
01:21 10 present world are under continuous assault all the time,
11 everywhere, essentially creating a globalized theater of
12 conflict in which every Muslim everywhere was under a duty to
13 fight at all times.

14 Q. Did that -- did that idea that Muslims were -- everywhere
15 were to fight at all times, did that increase after September
16 11th?

17 A. Again, that's very complicated. I think the initial
18 reaction of most Muslims, at least most Muslims that I know,
19 was of revulsion and shock and horror, and the idea that
01:22 20 Muslims were under an individual obligation to fight seemed
21 quite absurd. I think most people thought that Osama bin
22 Laden's declaration of war and declaration in 1998 that
23 individual Muslims were under such an obligation, was not very
24 persuasive.

25 Events after 9/11, however, because of the global war

1 on terror and certain actions that were taken in pursuant of
2 that, have led more Muslims to give credence to the truth of
3 the 1998 Fatwa.

4 Q. Where were you on September 11th?

5 A. It was my second day at work. I was walking to work, and
6 I happened to be crossing at the North Tower when the first
7 plane hit. So I was sort of an eyewitness. I was immediately
8 under the first plane when it hit.

9 Q. Now, is there an individual obligation on every Muslim to
01:23 10 do Jihad? And by that I mean actually go out to the
11 battlefield.

12 A. Again, it depends. If you happen to live in a Muslim town
13 and that Muslim town comes under attack by a non-Muslim enemy,
14 then according to Islamic law, you had an obligation to defend
15 the town. Otherwise, you did not. So in the ordinary
16 circumstance, all things being equal, it would be exceptional
17 to conclude that any individual Muslim has an obligation under
18 Islamic law to involve himself in fighting.

19 Q. What about this -- where did this concept come from that
01:23 20 Muslims from outside -- let's use as your example a town is
21 attacked. Muslims within the town must defend, correct? Where
22 does the concept come from that Muslims outside the town must
23 come and help fight?

24 A. Yeah. That's a result of a concept in Islamic law called
25 a communal duty. So the idea is that if a Muslim town comes

1 under attack and the individual Muslims in that locality are
2 unable to ward off the invaders, then Muslims living nearby
3 have to come to their aid.

4 So, in theory, because of this idea of communal
5 obligation of self-defense, the people who become obligated to
6 go help repel the invasion could continually grow in space and
7 time until enough people are amassed that can repel the
8 invaders.

9 Q. In the context of Muslim law and theology, can a Muslim
01:24 10 fulfill his or her obligation to Jihad in nonviolent ways?

11 A. Yes. According --

12 Q. Go ahead.

13 A. According to Islamic law and theology, even in a
14 circumstance where there is an invasion, one might not
15 necessarily have to actually go out to the front lines and
16 fight. One can participate by, for example, treating the
17 wounded, providing supplies, et cetera.

18 Q. Could a Muslim -- I'm going to give you a hypothetical
19 question. Could a Muslim who believes the United States has
01:25 20 committed aggression in the Muslim world, for example, by
21 invading Iraq, could they engage in Jihad without actively
22 going to Iraq and fighting?

23 A. From the religious perspective, yes.

24 Q. I want to turn to what's been in this case a great deal,
25 the 39 Ways. Are you familiar with this document?

1 A. Yes, I am.

2 Q. Did you read it in English and in Arabic?

3 A. Yes, I did.

4 Q. When you read it in the original Arabic, did you see
5 anything that indicated that the writer was a member of al
6 Qa'ida or that al Qa'ida was involved in that document?

7 A. No, I did not.

8 Q. Now, can you explain the significance of the 39 Ways in
9 light of Islamic law and theology?

01:26 10 A. Yes. In light of Islamic -- in light of Islamic law and
11 theology, the 39 Ways essentially regurgitates the moral
12 virtues that are associated with Jihad and the different ways
13 that a Muslim can participate in Jihad on the assumption that
14 they're not really going to fight.

15 Q. Would you describe it as a training manual?

16 A. I think that would be a very unreasonable description of
17 it.

18 Q. Why?

19 A. Because it doesn't indicate any way to do anything. It's
01:26 20 not operational. So, for example, it tells you that you should
21 support the mujahideen, without defining who they are, by
22 giving them money. But it doesn't tell you how you can do so.
23 It tells you that you should, for example, travel to a place
24 where Jihad is, but it doesn't suggest any practical ways of
25 getting there.

1 And then it suggests other means perhaps that are in
2 the capacity of an individual reader to do it, but those, I
3 don't think, could objectively be called as training for
4 anything; for example, jogging, taking care -- excuse me, you
5 know, not sleeping with the wives of people who are on the
6 front line. It doesn't really seem to rise to the level of
7 training for a war.

8 Q. Is the 39 Ways -- does that speak of defensive or
9 offensive Jihad?

01:27 10 A. The 39 Ways expressly refers to defensive Jihad.

11 Q. How does the 39 Ways -- can you -- how does that relate to
12 past documents in Islamic law and theology?

13 A. I'm sorry. I don't understand the question.

14 Q. Bad question. In the 39 Ways, did you see references to
15 Hadiths and the Qur'an?

16 A. Yes. I did a tally, and I think there were at least 40
17 verses of the Qur'an cited in that book and 42 Hadiths of the
18 prophet, all of which, you know, any reasonably literate Muslim
19 would have come across in his or her religious education.

01:28 20 Q. Are you a Muslim?

21 A. Yes, I am.

22 Q. In the 39 -- I would ask you: Did the 39 Ways provide
23 anything new --

24 A. No.

25 Q. -- to Muslim theology and law?

1 A. No.

2 Q. Now, have you reviewed other literature about Jihad?

3 A. Yes, I have.

4 Q. Were you asked to review other literature for a case in
5 Canada?

6 A. Yes, I did.

7 Q. How would you describe those materials you reviewed in
8 comparison to the 39 Ways?

9 MR. CHAKRAVARTY: Objection, your Honor.

01:28 10 THE COURT: Sustained.

11 Q. Would you -- how would you describe the 39 Ways in terms
12 of propaganda or its visceral calling?

13 MR. CHAKRAVARTY: Objection, your Honor.

14 THE COURT: Sustained.

15 Q. How would you describe the 39 Ways?

16 A. It's a generic work that describes the virtue of Jihad and
17 the virtue that one can obtain by participating in different
18 things that are nonlethal.

19 Q. Now, there are sections of the 39 Ways that call for
01:29 20 fighting, are there not?

21 A. That makes references to a generic battlefield somewhere.

22 Q. When you say "a generic battlefield somewhere," what do
23 you mean?

24 A. What I mean is, again, it simply affirms the generic
25 virtue of fighting in a Jihad. It doesn't tell you: Go to

1 Iraq. It doesn't tell you: Go to Somalia. It doesn't tell
2 you to go to Palestine. It doesn't tell you anything about
3 anywhere. So it's not concrete. It's simply generic. And
4 that's what I mean that it simply reiterates what every Muslim
5 already knows: that Jihad is a good thing. It doesn't speak
6 on any concrete circumstances.

7 Again, I think the point that's important, if I can
8 contrast Jihad to something like the Five Pillars --

9 MR. CHAKRAVARTY: Objection, your Honor.

01:30 10 THE COURT: I think it's gone beyond the question.

11 Q. Can you contrast Jihad to the Five Pillars?

12 A. Yeah. The Five Pillars of Islam are something that every
13 Muslim must do. When you wake up in the morning, you have to
14 pray. There's a morning pray. Jihad is what's known as
15 contingent obligation. It only exists if the facts in the
16 outside world requires it. So a work that incites to Jihad
17 would have to focus on the fact that would convince a Muslim
18 that they have to go out and fight. The 39 Ways is shockingly
19 long on abstract rhetoric and very short on concrete facts.

01:30 20 Q. What is religious rhetoric?

21 A. Religious rhetoric is the language and symbols that are
22 used in religious discourse, in preaching, for example, to
23 inspire people.

24 Q. Could you compare the 39 Ways to this concept of religious
25 rhetoric or inspiration?

1 A. Yes. I would consider 39 Ways to be a piece of religious
2 rhetoric.

3 Q. Now, could you -- have you seen pro-Jihadi propaganda
4 issued by al Qa'ida and other terrorist groups?

5 A. Yes, I have.

6 Q. How would you compare that to 39 Ways?

7 MR. CHAKRAVARTY: Objection, your Honor, to "Jihadi
8 propaganda."

9 THE COURT: I'm sorry?

01:31 10 MR. CHAKRAVARTY: The scope of the witness' disclosure
11 was on Islam.

12 THE COURT: I think that's true in this case.
13 Sustained.

14 Q. Now, you've reviewed the documents written or concerning
15 Tarek Mehanna?

16 A. Yes, I have.

17 Q. Can you just categorize sort of the types of documents
18 that exist?

19 A. They are the internet messenger chats. They're the Tibyan
01:32 20 posts. There are his postings on his own blog that I reviewed.
21 I might have seen a few emails. But primarily I focused on the
22 chats and the posts.

23 Q. Did you --

24 THE COURT: Excuse me. If you're going to get into
25 the area where we're going to maybe refer to some specific

1 ones, I think we'll take a morning recess. We'll take about a
2 15-minute recess.

3 (Recess taken at 11:27 a.m.)

4 (After the recess:)

5 THE CLERK: All rise for the Court and the jury.

6 (The Court and jury enter the courtroom at 11:46 a.m.)

7 THE CLERK: Please be seated.

8 BY MS. BASSIL:

9 Q. Dr. Fadel, I want to turn to Mr. Mehanna's writings on
01:53 10 Tibyan Publications. Are you familiar with Tibyan
11 Publications?

12 A. I was not familiar with it before you showed it to me, but
13 I am now.

14 Q. And have you read many of the postings on Tibyan
15 Publications and postings by other people?

16 A. Yes, I did.

17 Q. Did Mr. Mehanna write only about jihad on Tibyan
18 Publications?

19 A. No, he wrote about scores and scores and scores of topics.

01:54 20 Q. And what do you mean by that?

21 MR. CHAKRAVARTY: Objection, your Honor.

22 THE COURT: Overruled.

23 THE WITNESS: He wrote about the most mundane aspects
24 of being a Muslim, like whether you should sleep on your right
25 side or your left side or your stomach; how, when you recite

1 your prayers, should it be loud, should it be soft; what kind
2 of male could serve as a proper marriage guardian for a girl
3 who wanted to get married. So there were just scores of really
4 ordinary -- talking about completely mundane, ordinary things
5 from the perspective of Islam.

6 BY MS. BASSIL:

7 Q. I'm sorry. I'm sorry; I have to ask: Does Islam really
8 tell you whether to sleep on your right side or on your left
9 side?

01:54 10 A. Well, for certain people who are very keen on following
11 the example of the prophet Mohammed, they want to do everything
12 in their lives the way he did it. So in the Hadiths there are
13 reports that he would like to sleep in a certain way. And so
14 for those people, particularly Salafis, they are very keen to
15 try to do everything in the way the prophet did it.

16 Q. All right. Now, when you looked at the post by
17 Tarek Mehanna, did he refer to sort of religious rulings -- I'm
18 sorry, "rulings" isn't the right word -- but did he refer to
19 theology?

01:55 20 A. Yes, he did.

21 Q. How so?

22 A. Well, he -- in his postings, he consistently formulated
23 positions based on a certain method of interpretation.

24 MR. CHAKRAVARTY: Objection.

25 THE COURT: What's the objection?

1 MR. CHAKRAVARTY: At this point he's saying "he
2 formulated his opinions based on."

3 THE COURT: Oh, okay.

4 MS. BASSIL: I'll rephrase it.

5 THE COURT: Yes, fine.

6 BY MS. BASSIL:

7 Q. If you could rephrase that. What do the postings reflect
8 in terms of religious theology?

9 A. The postings reflected a person who was writing in the
01:56 10 Salafi tradition.

11 MR. CHAKRAVARTY: Objection, your Honor. He's
12 characterizing the defendant.

13 THE COURT: No, I think he's characterizing the
14 written texts, which is different.

15 BY MS. BASSIL:

16 Q. What is the Salafi tradition of writing?

17 A. The Salafi tradition of writing is to cite verses from the
18 Qur'an and Hadiths of the prophet Mohammed and opinions of the
19 early community when justifying a particular practice or
01:56 20 belief.

21 Q. Is there a right answer?

22 A. I think Salafis believe there is. Many Muslim theologians
23 of other traditions believe that these matters are not amenable
24 to correct answer.

25 Q. Now, from the writings that you reviewed by Mr. Mehanna,

1 were you able to determine how serious he was about his
2 scholarship?

3 MR. CHAKRAVARTY: Objection, your Honor.

4 THE COURT: Sustained to that.

5 MS. BASSIL: I'll rephrase that.

6 BY MS. BASSIL:

7 Q. Were you able to determine how serious the writings were
8 about Islamic law and theology?

9 MR. CHAKRAVARTY: Objection.

01:57 10 THE COURT: That's the same thing. Sustained.

11 BY MS. BASSIL:

12 Q. Now, let me start with this: Are you familiar with the
13 positions of al Qa'ida on certain topics of law and theology?

14 A. Yes, I am.

15 Q. And were the writings that you reviewed consistent with
16 those positions?

17 A. No, they were not.

18 Q. All right. I'm going to start with the first one. What
19 would you describe as the central position of al Qa'ida?

01:57 20 A. The central position of al Qa'ida with respect to the law
21 of jihad is that all Muslims are under an obligation -- an
22 individual obligation -- to fight Americans wherever and
23 whenever they can find them, and nationals of countries that
24 are allied with Americans wherever and whenever they can find
25 them, including stealing their property. So killing them and

1 stealing their property and destroying their property wherever
2 and whenever they can find them, as well as the nationals of
3 countries allied with the Americans.

4 Q. And when did that philosophy -- or when did that statement
5 first appear?

6 A. As far as I know, Osama bin Laden gave a fataawa in 1998
7 in which he made this opinion explicit and said it was the
8 command of God directed toward all individual Muslims.

9 MR. CHAKRAVARTY: Objection, your Honor. May we
01:58 10 approach?

11 THE COURT: All right.

12 (Discussion at sidebar and out of the hearing of the
13 jury:)

14 MR. CHAKRAVARTY: Your Honor, I recognize your Honor's
15 position that he can talk about al Qa'ida because it's subsumed
16 within kind of Islamic history. The concern here is --
17 especially because of the lack of notice as to what the basis
18 of his understanding is of how he knows about al Qa'ida -- is
19 this: What the witness just said is al Qa'ida believes X, the
01:59 20 defendant believes something different than X. That's using
21 the defendant's statements for the truth of the matter. It's
22 one thing to say what al Qa'ida believes for the truth of the
23 matter; it's another thing to say what the defendant believes
24 for the truth of the matter.

25 Now essentially what he's doing is looking at a

1 universe of data, which we don't know what that data is -- it
2 was presumably discovery that we've provided the defense, and
3 the jury doesn't know either -- and he's assessed and
4 synthesized from that data that this defendant's beliefs are,
5 as a matter of fact, contrary to al Qa'ida's beliefs.

6 MR. AUERHAHN: Even if it's identifications of a
7 specific chat, if it's being offered to show that he disagreed
8 with al Qa'ida, which is clearly what it's being offered for,
9 it's being offered for the truth of the statement, then that's
01:59 10 in the chat, which is hearsay.

11 MR. CHAKRAVARTY: This is the back door that they're
12 using experts to somehow --

13 MS. BASSIL: No --

14 THE COURT: I don't think that's necessarily so true.
15 I do think, perhaps, we should have a little more foundation
16 for his basis of familiarity.

17 MS. BASSIL: I'm happy to do that.

18 THE COURT: He said it very summarily but, perhaps --
19 because, for example, if it was simply based on his study of
02:00 20 discovery materials, then I think that might not be sufficient.
21 If he has in his professional life kept up with it, that's a
22 different story.

23 MS. BASSIL: Sure. I can do that. But I don't want
24 to hear, "Objection. It's outside of the scope." And I would
25 like to point out, your Honor, that we had people who were

1 "readers" when suddenly they were testifying to their expertise
2 about Fallujah and opening links and so forth. So this idea
3 that our notice is to be used as a verbatim transcript is
4 really unfair, and it becomes even more unfair because the
5 government wasted weeks of time and now we're at the end of
6 this case and we're being pressured time-wise. I don't think
7 it's fair.

8 THE COURT: Coming back to the hearsay problem, I
9 don't think it's necessarily hearsay. It may depend on
02:00 10 particular texts to say --

11 MS. BASSIL: It does not go to the --

12 THE COURT: I don't know. I guess we'll have to see
13 what they are.

14 MS. BASSIL: It does not go to the ultimate issue.

15 MR. CHAKRAVARTY: If -- you know, Mr. Groharing makes
16 a good point. If, you know, the only valid -- only probative
17 value of him saying that what the defendant said was
18 inconsistent with al Qa'ida is either for what the defendant
19 believed or whether he had the requisite intent to commit the
02:01 20 crime, it's classic 704(b) opining as to the defendant's state
21 of mind.

22 THE COURT: Well, he can't give that opinion. I agree
23 with that. To contrast the gist of an expression with the gist
24 of another expression I think he may be able to do. That's why
25 we may have to judge it --

1 MS. BASSIL: Occasionally he slips up and I try to
2 rephrase it. But it -- the government has spent six, seven
3 weeks putting up instant messages to show what al Qa'ida said,
4 having Mr. Kohlmann talk about them. They've done it. This is
5 our turn.

6 THE COURT: Well, everything's not entirely
7 symmetrical, but we'll leave it at that.

8 MS. BASSIL: It should be symmetrical.

9 THE COURT: Go ahead.

02:02 10 (In open court:)

11 BY MS. BASSIL:

12 Q. Dr. Fadel, let's step back a bit. Could you relate to the
13 jury how you know through your professional work what some of
14 these tenets are by al Qa'ida?

15 A. Well, as I mentioned earlier, I wrote a very extensive
16 encyclopedia entry on the law of jihad and its history for the
17 Max Planck Encyclopedia of Public International Law. In the
18 course of that I learned about the historical doctrines -- or I
19 researched the historical doctrines of jihad and classical
02:03 20 Islamic sources and modern Islamic sources.

21 It's very easy to get al Qa'ida's view on jihad. It's
22 available on Frontline, PBS, I think, for anyone to read. And
23 there is the 1996 fataawa in which Osama bin Laden declared war
24 on the United States, and there's the 1998 fataawa in which he
25 expounded his opinion that all Muslims are under a legal

1 obligation, and an individual legal obligation, to kill
2 Americans and plunder their wealth whenever and wherever they
3 can. So it's not rocket science.

4 Q. After you wrote the article for the encyclopedia, did you
5 keep up with statements by al Qaeda or their positions as they
6 may have evolved?

7 A. Well, I only -- I finished that article quite recently, in
8 2009, and I don't follow every single statement al Qaeda says
9 or does. I think that their statement is there -- they haven't
02:03 10 retracted it as far as I know -- and so that represents their
11 doctrine.

12 Q. All right. Now I would like to turn to Exhibit 420.

13 THE COURT: This is the government's computer?

14 MR. BRUEMMER: Yes, your Honor.

15 MS. BASSIL: Yes, your Honor.

16 And if we could blow up the bottom part? From here.

17 MR. CHAKRAVARTY: Your Honor, we went over this post
18 with Dr. March. It seems to be a duplicative area of
19 testimony.

02:04 20 THE COURT: Well, go ahead.

21 MS. BASSIL: Thank you.

22 THE COURT: Overruled.

23 BY MS. BASSIL:

24 Q. Dr. Fadel, this is a post. Are you familiar with this
25 post?

1 A. Yes, I am.

2 Q. And "Abu Sabaayaa" is the name that Tarek Mehanna used?

3 A. That's what I was told.

4 Q. All right. And this is dated March 9, 2005?

5 A. That's what it says.

6 Q. All right. Now, in this post -- could you read this post
7 where it starts with "right"? Or let me read it.

8 A. Okay.

9 Q. "Right. The Americans live in a democracy. This is a
02:05 10 common argument that is used to justify things like this, and
11 this is what I have a problem with: that simply because the
12 person is an American, and America is at war with the Muslims,
13 then that means that you can kill him."

14 MS. BASSIL: Can you turn to the next page?

15 Q. "I used to believe this, but after long reflection and
16 thought, I have come to the conclusion, and Allah knows best,
17 that this is an incorrect concept."

18 Can you explain -- can you contrast this -- first of
19 all, can you describe this issue of democracy with respect to
02:05 20 al Qa'ida's tenets?

21 A. Yes. As one can imagine, the 1998 fataawa of
22 Osama bin Laden was considered quite shocking. And most
23 Muslims found it -- I would say the overall majority of Muslims
24 found it to be implausible on its face. So one of the
25 arguments that was formulated in defense of this fataawa was

1 the idea, Well, Americans are in a democracy. And because
2 they're in a democracy they elect their own leaders and they
3 are, therefore, morally responsible for the policies that
4 America undertakes. So it's, therefore, just that they should
5 be targeted for the sins that the American government has
6 visited upon Muslims. That was the argument.

7 Q. And was there anything in that argument also about paying
8 of taxes?

9 A. Yes. That was another theory that al Qa'ida --

02:06 10 Q. Whose theory?

11 A. -- al Qa'ida theorists justified in support of the 1998
12 fataawa. They said that Americans -- America would not be able
13 to wage war against Muslims unless the American government had
14 money. The American government gets money from taxes -- taxes
15 paid by American citizens; therefore, American citizens are
16 aiding and abetting wars against Muslims so, therefore, they're
17 legitimate targets.

18 Those were the two primary targets, as far as I know,
19 that were used to justify the 1988 -- 1998 fataawa.

02:07 20 Q. And what -- this posting by Tarek Mehanna, can you
21 contrast that posting to this tenet by al Qa'ida -- or this
22 belief by al Qa'ida?

23 A. Yes. This particular posting of Mr. Mehanna expressly
24 repudiates the first justification of the 1998 fataawa; namely,
25 that because Americans live in a democracy, it's legitimate

1 from the perspective of Islamic law to target them in war.

2 Q. And there's also a line on here -- I think Dr. March
3 talked about it, or perhaps he was cross-examined with it --
4 "Those who fight us, not those who carry the same nationality
5 as those who fight us."

6 Can you explain what that line means and contrast
7 it -- I'm sorry. Can you contrast that line to the philosophy
8 of al Qa'ida?

9 A. Yeah. Again, the philosophy of al Qa'ida is to try to
02:07 10 justify an all-out unlimited war. This line suggests a much
11 more limited kind of conflict and that Muslims have to be
12 extremely careful about who they target which is, again,
13 contrary to the position of al Qa'ida in which one doesn't have
14 to worry -- all one has to worry about is the nationality of
15 the target.

16 MS. BASSIL: Now, if we could turn to Exhibit 423,
17 please? If we could make that first block bigger?

18 Q. Now, what was written here -- this is March 10, 2005?

19 A. It appears so, yes.

02:08 20 Q. And again, this was by Abu Sabaayaa who, as you understand
21 it, was Tarek Mehanna?

22 A. Yes.

23 Q. And it says, "Was there a single country on earth, Western
24 or otherwise, in which there were not massive anti-war
25 demonstrations?" And he discusses anti-war demonstrations.

1 And the last line he says, "So after looking at these two
2 realities with a just mind, one can no longer use the argument
3 that America lives in a democracy, which they don't, therefore,
4 every single American in the world, civilian or military, can
5 be killed on the spot."

6 Could you contrast that writing to the tenet of
7 al Qa'ida that you described?

8 A. Yes. It appears to be an express repudiation of the
9 central premise of the 1998 fataawa; namely, that Muslims were
02:09 10 under an individual obligation before God to kill Americans
11 anywhere and everywhere they could find them.

12 MS. BASSIL: Could we have, Mr. Oh, Exhibit 1263? I'm
13 sorry. Could we have Exhibit 1182? We found it. Thank you.

14 THE COURT: Is this in evidence?

15 MR. CHAKRAVARTY: It's not in evidence, your Honor.

16 MS. BASSIL: That's correct. This is part of the
17 documents the government gave us, your Honor.

18 THE COURT: All right. So this is -- in the first
19 instance I'll show it just to the witness?

02:10 20 MS. BASSIL: Well, I believe we can show it to
21 everyone, your Honor.

22 THE COURT: Well, it's not yet in evidence.

23 MR. CHAKRAVARTY: It's not in evidence.

24 MS. BASSIL: I move it into evidence.

25 MR. CHAKRAVARTY: This is a post about bank loans.

1 THE COURT: Oh, well --

2 MR. CHAKRAVARTY: It may be within the witness's
3 expertise, but it is not relevant to this case.

4 MS. BASSIL: Well, it is relevant, your Honor. What's
5 relevant is --

6 THE COURT: Okay. If there's no objection to its
7 authenticity, I'll admit it and overrule the relevance
8 objection.

9 MS. BASSIL: Thank you.

02:11 10 (Defense Exhibit No. 1182 received into evidence.)

11 MS. BASSIL: If we could --

12 THE COURT: What's the number again?

13 MS. BASSIL: Sorry.

14 THE COURT: What's the number again?

15 MS. BASSIL: 1183, your Honor. -82. Sorry. 1182.

16 THE COURT: Okay.

17 MS. BASSIL: And if you could just blow up the whole
18 thing so that --

19 Oh, John. If you could just blow up the whole thing.

02:11 20 BY MS. BASSIL:

21 Q. All right. Dr. Fadel, do you see this post on April 8,
22 2007?

23 A. Yes, I do.

24 Q. And at first there's a quote by someone else, correct?

25 A. That is correct.

1 Q. And that post refers to taxes and revenue of the
2 government making somebody combatants in the war against Islam?

3 A. That's correct. Specifically, banks.

4 Q. And how does that fit in with al Qa'ida's beliefs?

5 A. Yes. This poster -- this person, Abu Faaris, his posting
6 suggests that banks are a legitimate target of war because they
7 provide so many tax -- so much tax revenue to the United States
8 government that they're effectively but-for causes, for the
9 ability of the United States to wage war; so, therefore, they
02:12 10 can be targeted and attacked.

11 Q. And would you compare the response by Tarek Mehanna to
12 this belief and how that is consistent or inconsistent with
13 al Qa'ida's positions?

14 MR. CHAKRAVARTY: Objection, your Honor.

15 THE COURT: Overruled.

16 THE WITNESS: Yes. The reply says that really it's
17 irrelevant how many -- how much taxes banks pay to the United
18 States government because from the practice of the prophet we
19 know -- we know with certainty that Muslims are under an
02:13 20 obligation to abide by their commitments to all kinds of
21 non-believers, whether they are at war with us, whether they
22 are the leaders of unbelief, or the sweet 70-year-old lady who
23 lives next door.

24 BY MS. BASSIL:

25 Q. Could you read -- the first line he says -- the writing

1 states, "Beautiful: A do-it-yourself fatwaa." And then the
2 second paragraph, could you read that?

3 A. I'm sorry. What's the first thing you want me to comment
4 on?

5 Q. Where it starts "unfortunately."

6 A. Okay. I'm confused now. Do you want me to comment on
7 "Beautiful: A do-it-yourself fataawa"?

8 Q. If you'd like. Can you comment on that and what that
9 means in terms of the writing in comparison to al Qa'ida?

02:13 10 A. Well, it's not with respect to the comparison of
11 al Qa'ida. What -- this language is criticizing Abu Faaris for
12 making a -- reaching a dramatic conclusion without any kind of
13 valid religious evidence in support of that conclusion. And so
14 it's highly critical of basically this arbitrary attempt to
15 justify violence without any solid evidence that it would be
16 permissible in Islam.

17 Q. And would you read the next paragraph?

18 A. All right. "Unfortunately, this, as well as all of the
19 other posts on this thread that support this opinion,
02:14 20 completely sidesteps all of the clear-cut dalil," which means
21 evidence, "that the prophet made it mandatory to abide by all
22 agreements with the kuffar," non-believers, "whether they are
23 muharibin," meaning waging war, "the heads of kufr," meaning
24 the leaders of unbelief, "or the sweet 70-year-old lady who
25 lives next door, assuming, of course, that we all are agreed

1 that the words of the prophet are the undisputable authority."

2 Q. And the next paragraph?

3 A. "And in regards to the opinion that a country officially
4 being known as a democracy automatically entails that its
5 citizens wholeheartedly support all of the policies of their
6 government simply on account of their living in that country,
7 there has been ample evidence in the past few years that this
8 is a very simplistic world view that is no longer in tune with
9 the current reality of the world, particularly, the Western
02:15 10 societies.

11 "I know this ruins everything, as we would no longer
12 have the easy and convenient 'kill 'em all' solution to our
13 problems. But let's be mature. We have to take the Shar',"
14 meaning revelation, "and apply it to what is reality, not what
15 we want reality to be. It's like one person trying to convince
16 another on a summer afternoon in the middle of the desert that
17 the sun is in the sky with that person stubbornly insisting
18 that there is no sun in the sky."

19 Q. Now, in this writing there's a reference, and in quotes,
02:15 20 "an easy and convenient 'kill 'em all' solution to our
21 problems." Who espouses a "kill 'em all" solution?

22 A. Al Qa'ida.

23 MS. BASSIL: Now could we turn to potential Exhibit
24 1183?

25 THE COURT: All right. Again --

1 MS. BASSIL: I would move this into evidence, your
2 Honor.

3 THE COURT: -- if the objection is only relevance --
4 if the only objection is relevance, I'll overrule it.

5 MR. CHAKRAVARTY: And the other is hearsay which I
6 also assume --

7 THE COURT: All right. Consistent with our
8 previous --

9 MR. CHAKRAVARTY: And this particular one, again, it
02:16 10 appears we also discussed with Mr. March, so the fact that it's
11 duplicative and overlapping.

12 THE COURT: Okay. Those objections are overruled and
13 I'll admit it.

14 MR. CHAKRAVARTY: Your Honor, with regard to the
15 hearsay -- and I don't mean to belabor this, but maybe at some
16 point, if any, the government would ask for a limiting
17 instruction just to remind the jury what is not being offered
18 for the truth of the matter.

19 (Defense Exhibit No. 1183 received into evidence.)

02:17 20 BY MS. BASSIL:

21 Q. Dr. Fadel, did you review this post on April 9, 2007?

22 A. I approved -- I reviewed this April 9th post, not on April
23 9th, but I did review it.

24 Q. All right. And this post refers to an 'ahd. What's
25 an -- what is 'ahd?

1 A. 'Ahd.

2 MR. CHAKRAVARTY: Objection, your Honor. This is
3 exactly what Dr. March was called to testify about.

4 THE COURT: I understand. Overruled.

5 THE WITNESS: It means "covenant." And typically, in
6 Islamic law it refers to a covenant of peace between a Muslim
7 state and a non-Muslim state.

8 BY MS. BASSIL:

9 Q. And I'm not going to go over this in detail. Did you sit
02:18 10 through some of the testimony of Dr. March?

11 A. A little bit of it on cross -- not on direct, just on
12 cross, and the last day of his cross.

13 MS. BASSIL: And if you could scroll down, John? Keep
14 going. And if you could go to the next page?

15 Q. In reviewing this post did you -- was there a discussion
16 of the embassy bombings in Tanzania?

17 A. I don't think this one has it. There is a post where
18 there's a discussion of the Tanzania bombing, but I don't think
19 it's this one.

02:18 20 Q. This one -- and it's your understanding that Abu Sabaayaa
21 is Tarek Mehanna and he wrote this post. Is that correct?

22 A. That's correct.

23 Q. All right. And this post, is this basically on the
24 subject of pacts and treaties?

25 A. Yes, it is, except it's a little more complicated than

1 that.

2 Q. What else does it refer to that is inconsistent with
3 al Qa'ida? And I don't want you to get into pacts and treaties
4 because we heard about that from Dr. March.

5 A. Yes. Here it repudiates the idea that because America is
6 at war with Muslims, that it's permissible for Muslims living
7 in a non-Muslim country like the United States to breach their
8 individual promises to America. For example, I am Muslim. I
9 live in -- well, Canada. So Canada is an ally of the United
02:19 10 States. I borrow a loan from a Canadian bank to buy my home.
11 According to al Qa'ida, it's perfectly permissible for me to
12 then defraud that bank and not pay that loan back. This post
13 says that that's a sin if I did that.

14 MS. BASSIL: Now, if we could go to Exhibit 419, Paul?
15 I'm sorry. Could we go to 423 first? And if we could make
16 that a little bit -- if we could make it -- and that would be
17 the next page. Make that bigger?

18 Q. Now, are you familiar with this post, that's already in
19 evidence, on March 10, 2005?

02:20 20 A. Yes, I am.

21 Q. And you understand Abu Sabaayaa to be Tarek Mehanna?

22 A. Yes, I do.

23 Q. Would you read the very last paragraph of that post?

24 A. Yes. "And finally, I advise many of the younger brothers
25 who are living in the West who spend" -- I think if you could

1 move the arrow -- "who spend most of their time reading into
2 these issues -- i.e., about jihad -- which don't even directly
3 affect them, to utilize their time more wisely in reading and
4 reflecting off of the book of Allah and the meanings of his
5 words, strengthening your imaan," faith, "and to begin to
6 actively call those millions and millions of disbelievers
7 around you to this deen," religion, "for this is more useful
8 than reading volumes about the rulings on events taking place
9 thousands of miles from where you are sitting."

02:21 10 Q. How is that paragraph inconsistent with al Qa'ida's
11 beliefs?

12 A. Well, it contains an implicit rejection of a notion of a
13 global battlefield in which Muslims are under a supreme
14 obligation to fight, namely, and kill Americans whenever and
15 wherever they can; in fact, it suggests that it's not a healthy
16 concern to be over-concerned with events going on thousands of
17 miles away and instead, they would be better off, as Muslims,
18 to try to learn more about Islam and be better Muslims and call
19 non-Muslims to Islam.

02:21 20 MS. BASSIL: And could we have Exhibit 419, please?
21 And if we could have the first part of this post highlighted.

22 Q. And are you familiar with this post by Abu Sabaayaa?

23 A. Yes, I am.

24 Q. And this is dated March 8, 2005?

25 A. Yes.

1 Q. And would you read this post? Well, what was posted by
2 Abu Sabaayaa?

3 A. "Another question for thought: Even if they were
4 Americans or Westerners who were killed in those attacks, is
5 every single disbeliever on the land of al-Jazeera," meaning
6 the Arabian Peninsula, "to be killed regardless of whether or
7 not they are actively engaged in war against the Muslims? Does
8 the Hadith," saying of the prophet, "say 'kill' every mushrik,"
9 polytheist, "in the Arabian Peninsula or does it say expel them
02:23 10 from it? There's a difference."

11 Q. And could you contrast that statement with the beliefs
12 suggested by al Qa'ida?

13 A. I don't know exactly what al Qa'ida says on this position,
14 but I assume, again, that the generality of the language in
15 1998 would apply.

16 MR. CHAKRAVARTY: Objection.

17 THE COURT: I think the first part of the question
18 answered it. He doesn't know.

19 BY MS. BASSIL:

02:23 20 Q. And in this, at least what you were referring to as
21 al Qa'ida's position, the 1998 fataawa of killing every
22 American, is that in contrast to expelling people from the
23 Arabian Peninsula?

24 A. Yes, it would be. The apparent meaning of the 1998
25 fataawa doesn't make an exception for Americans on the Arabian

1 Peninsula.

2 Q. Is there any history in Islamic history and theology
3 concerning expelling people from lands of -- where Muslims are
4 in the majority or lands of Islam?

5 A. Well, the Arabian Peninsula, according to most Muslim
6 jurists, has a special status. And so some jurists believe
7 that non-Muslims are not allowed to reside permanently in the
8 Arabian Peninsula. And so without getting into all the details
9 about that, the dispute here is whether or not you can use
02:24 10 violence to expel non-Muslims who are otherwise peaceful and in
11 the Arabian Peninsula. And this posting suggests that you
12 can't.

13 Q. You can?

14 A. You can't use violence.

15 Q. I'm sorry. You can't use violence; you can use expulsion?

16 A. Yes.

17 MS. BASSIL: Could we go to Exhibit 1263, John?

18 This would be just the first page, Mr. Chakravarty,
19 1263. Just the very first page. We'll deal with correcting it
02:25 20 later, but I'm just referencing you.

21 MR. CHAKRAVARTY: I'm not sure what is being admitted
22 here. The first page of 1263 or --

23 MS. BASSIL: All I'm doing is trying to help
24 Mr. Chakravarty locate --

25 THE COURT: Okay. You're limiting the offer to the

1 first page?

2 MS. BASSIL: I'm trying to be nice.

3 THE COURT: All right. You're limiting the offer to
4 the first page?

5 MS. BASSIL: Not at this time, your Honor, but I am
6 referencing the first page.

7 MR. CHAKRAVARTY: Which is my confusion. Is she
8 offering the whole exhibit or just the first page?

9 MS. BASSIL: I will offer just the first page, if that
02:26 10 makes a difference.

11 THE COURT: Okay.

12 MR. CHAKRAVARTY: Your Honor, the way that the defense
13 has provided the exhibit, these are different versions of a lot
14 of the conversations which the jury has seen. If counsel
15 represents that 1263 is the entire thread, then the government
16 has no objection to the entirety of 1263 coming in.

17 MS. BASSIL: I will put in just the first page, your
18 Honor.

19 THE COURT: Okay.

02:26 20 (Defense Exhibit No. 1263 received into evidence.)

21 BY MS. BASSIL:

22 Q. Dr. Fadel --

23 THE COURT: 1263 -- well, 1263 --

24 MS. BASSIL: We'll correct it later.

25 THE COURT: -- becomes the first page of what you had

1 marked.

2 MS. BASSIL: Yes. Yes. Thank you.

3 And if we could blow up the bottom part? I'm sorry.

4 I'm looking for the Abu Sabaayaa. Thank you.

5 BY MS. BASSIL:

6 Q. All right. Dr. Fadel, are you familiar with this post
7 dated March 7, 2005?

8 A. Yes, I am.

9 Q. And could you read this post? And this is by Abu
02:27 10 Sabaayaa?

11 A. "Just because he doesn't gree with the bombings doesn't
12 mean he is a government scholar or a stooge of the government.
13 As far as I know, there was no revelation from above the
14 heavens confirming the bombings to be right or wrong.

15 "It's okay to not agree with the bombings. We're not
16 like the Madaakhilah who declare the other people to be
17 misguided simply because they have different opinions on
18 certain issues.

19 "Actually, now that I think about it, Shaykh Ibn
02:27 20 Jibreen also had a fataawa denouncing the bombings."

21 Q. I wanted to ask you, first of all, about what is
22 al Qa'ida's position on bombings?

23 A. That they're fine.

24 Q. All right. And can you contrast this post to al Qa'ida's
25 position?

1 A. Well, I think what this post -- the import of this post is
2 that there's no religious basis to conclude that these bombings
3 are permissible from Islamic law. So that one cannot conclude
4 that a scholar, particularly a religious scholar, who condemns
5 them is, therefore, a stooge of the Saudi Arabian government.

6 Q. All right. And in your knowledge as a scholar, are you
7 familiar with scholars who supported the Saudi Arabian
8 government?

9 A. Yes.

02:28 10 Q. And are you familiar with a scholar known as Bin Baz?

11 A. Yes, I am.

12 Q. Let me just spell it out for the jury.

13 (Writing displayed to jury.)

14 Q. And who was Bin Baz?

15 A. Bin Baz was the mufti --

16 Q. What's a mufti?

17 A. I'm sorry. "Mufti" is a religious scholar who's qualified
18 to give a fataawa. And he was the chief mufti -- one of the
19 most-senior muftis -- in the Kingdom of Saudi Arabia for many
02:28 20 years until his death.

21 Q. And what was -- what did he say about bombings?

22 A. Well --

23 Q. I'm sorry. What did he say about the United States?

24 A. In the early '90s, or I guess in 1990, after Saddam
25 Hussein invaded Kuwait and Saudi Arabia wanted to invite U.S.

1 troops to defend the kingdom against Saddam Hussein, there was
2 a lot of controversy as to whether or not allowing American
3 soldiers in the peninsula be permissible. And Bin Baz gave a
4 religious opinion of fataawa saying it was permissible --
5 religiously permissible for the Americans to come and defend
6 the kingdom.

7 Q. Now, let me ask you: the issue of American bases in
8 Saudi Arabia. Does al Qa'ida have a position on that?

9 A. Yes.

02:29 10 Q. What is that position?

11 A. They think it's categorically sinful and must be fought
12 militarily.

13 Q. And al Qa'ida's position, Doctor, are you aware of
14 whether there -- I think you talked about it's sinful and it
15 has a religious aspect to it. Did al Qa'ida espouse any sort
16 of political aspect to United States bases in Saudi Arabia?

17 A. Yes. They announced again in 1996, and then in 1998, that
18 American bases had to be driven out of the Arabian Peninsula.

19 Q. All right. And did you see references in postings by
02:30 20 Tarek Mehanna to Bin Baz?

21 A. Yes.

22 Q. And what were those references?

23 A. They were admirable.

24 MR. CHAKRAVARTY: Objection, your Honor.

25 THE COURT: No, that may stand.

1 BY MS. BASSIL:

2 Q. And were the references contradictory to al Qa'ida's view
3 of Bin Baz?

4 A. I don't know al Qa'ida's view of Bin Baz particularly.

5 Q. I'm sorry. Never mind.

6 I want to turn to a topic that I call "collateral
7 damage." And that is al Qa'ida's position on killing
8 civilians, including Muslims. Are you familiar with that
9 position?

02:30 10 A. Yes, I am.

11 Q. And how are you familiar with it?

12 A. Because of my research.

13 Q. Okay. And what is your understanding of al Qa'ida's
14 position on collateral damage?

15 A. Okay. Well, first I would like to make clear that
16 al Qa'ida doesn't recognize the concept of collateral damage
17 with respect to Americans because in the 1998 fatwaa, they
18 conclude that all Americans are culpable, so they're
19 essentially legitimate targets. So the issue of collateral
02:31 20 damage does not come up with individual Americans. The issue
21 of collateral damage comes up, however, with Muslims who are
22 killed in the course of an al Qa'ida operation.

23 Q. Let me stop you for a minute. Could you explain to the
24 jury what "collateral damage" is?

25 A. "Collateral damage" is the idea in the law of war that you

1 intend to target a certain military target which is considered
2 legitimate in the laws of war, but then in the course of
3 targeting that you also kill targets incidentally that would
4 not be legitimate had you intentionally targeted them from the
5 beginning.

6 Q. Can you give an example?

7 A. Suppose that the United States bombs a military airfield
8 in Iraq in the course of the campaign against Saddam Hussein
9 and there happens to be some civilian personnel on the airbase.

02:32 10 That would be collateral damage.

11 Q. And the civilians would be collateral damage?

12 A. The civilians would be collateral damage. It would not be
13 considered a violation of the laws of war.

14 Q. Now, you mentioned that al Qa'ida doesn't believe -- they
15 don't view Americans as collateral damage?

16 A. That's correct.

17 Q. What about Muslims, civilian Muslims?

18 A. Yes. Now, the fact that many of their operations kill
19 Muslims creates a big problem for al Qa'ida because, according
02:32 20 to al Qa'ida, they're defending Muslims, so they have to come
21 up with some theory, some justification for why it's okay for
22 those Muslims to be killed.

23 So they generally have two different theories.

24 Q. And what are those?

25 A. The first theory is called the human shield theory; the

1 second theory is the apostate theory.

2 Q. What is the human shield -- where is the human shield
3 theory -- where do these theories come from?

4 A. The human shield theory comes from a debate in medieval
5 Islamic jurisprudence that deals with the problem of necessity
6 or -- and targeting in the law of war.

7 Q. Can you explain what a human shield is and how that -- how
8 they talked about that?

9 A. Yeah. The original case would involve the following
02:33 10 scenario: You have a non-Muslim army that's invading Islamic
11 territory, and as they march they have Muslim prisoners in
12 their ranks, and so they take the Muslims and they put them at
13 the front lines so that it's impossible for the Muslim garrison
14 defending the border to shoot the enemy -- the enemy army
15 without killing Muslims who are not legitimate targets.

16 Q. And so what was the discussion in medieval books of law?

17 A. Well, medieval jurists tried to essentially figure out
18 under what circumstances it would be permissible for Muslims to
19 attack an enemy that was guarding themselves behind Muslim
02:33 20 human shields. And so they tried to develop various criteria

21 under which it would be okay to do that as opposed to doing
22 other things like, for example, ransoming the Muslim prisoners.

23 Q. And you said there was a second theory. What was the
24 second theory?

25 A. The second theory was that of an apostasy; namely, the

1 Muslims who were killed, even though they weren't the target,
2 it's okay, it's not a crime from the perspective of al Qa'ida
3 that they died, because they were apostates anyway.

4 Q. So al Qa'ida used this theory of both human shield and
5 apostates?

6 A. That's correct.

7 Q. To justify what?

8 A. To justify various attacks that they undertook in which
9 there was indiscriminate violence which killed scores of
02:34 10 Muslims and maybe some Americans -- maybe a few, maybe a lot.
11 It didn't matter -- but they killed lots of Muslims in the
12 course of these attacks. An example would be the embassy
13 bombing in 1998 in Tanzania.

14 Q. And there were Muslims who were killed in that attack?

15 A. Yes. Many more Muslims than Americans.

16 Q. Now, I would like to turn to Exhibit 1256.

17 MS. BASSIL: And again, your Honor, this would be a
18 new exhibit, and I would ask to put this into evidence.

19 MR. CHAKRAVARTY: It's a 108-page thread. We haven't
02:35 20 seen this before. Obviously, the government -- the objections
21 are the hearsay and the relevancy objections.

22 THE COURT: All right. Well, if this is the same,
23 we've already talked about those. If that's the objection,
24 then I will admit it.

25 Let me just remind the jury about the limitation on

1 some of these. I told you about the difference between
2 accepting a written statement as evidence of facts asserted in
3 the statement as opposed to evidence of the fact that the
4 statement was made, simply as a thing to be examined in a
5 sense, rather than as an assertion to be believed. That's the
6 basis on which they're admitted.

7 (Defense Exhibit No. 1256 received into evidence.)

8 MS. BASSIL: Thank you. Mr. Oh, can we turn to page
9 66? And if you could make that bigger?

02:36 10 BY MS. BASSIL:

11 Q. Dr. Fadel, are you familiar with this post by Abu
12 Sabaayaa -- I'm looking for a date on it.

13 MS. BASSIL: If you could -- yeah.

14 Q. It would appear the date before it is 1/30/2007. Are you
15 familiar with this post?

16 A. Yes, I am.

17 Q. And Abu Sabaayaa, again, is Mr. Mehanna's name, the name
18 he used?

19 A. As was told to me.

02:36 20 Q. All right. And the heading says, "Re: Pakistan Bombing
21 Kills 14 Policemen Including Senior Officers." Are you
22 familiar with that subject heading?

23 A. Yes, I am.

24 Q. And how are you familiar with it?

25 A. I'm familiar with it because I read these postings in the

1 course of the materials that were given to me.

2 Q. All right. And did you research anything concerning this
3 subject matter or were you familiar with it already?

4 A. I only read what was there.

5 Q. All right. Could you -- first of all, what did you
6 consider significant in this posting?

7 A. Well, it's a reply to somebody who purports to be
8 Ja'far al-Ansariy. Mr. Ansariy is trying to suggest that the
9 bombing in 1998 of the U.S. Embassy in Tanzania was Islamically
02:37 10 legitimate. And so his theory is that these are embassies of
11 kufr, embassies of disbelievers, and these are considered
12 territories of the nations themselves. So it's not really an
13 attack on a Muslim country like Tanzania; it's, rather, an
14 attack on the United States itself --

15 Q. And this is Mr. Ansariy?

16 A. This is Mr. Ansariy's proposed theory, yes.

17 -- and that the Muslims who lived there --

18 MS. BASSIL: Your Honor, I'm sorry. I'm not sure the
19 jury has this.

02:38 20 THE JURORS: We don't.

21 THE COURT: You don't? That may be my fault. Let me
22 just look. It is my fault.

23 Do you have it now? Okay.

24 MS. BASSIL: Thank you.

25 BY MS. BASSIL:

1 Q. Mr. Ansariy is proposing -- his question and his post
2 reflects al Qa'ida's position?

3 A. It would be consistent with the 1998 position that you can
4 attack Americans anywhere and everywhere.

5 Q. All right. And what is the significance of the posting by
6 Abu Sabaayaa?

7 A. Well, I think there are a couple of things here. First,
8 the question itself gives two theories justifying the bombing:
9 first, that the embassy is not really in a Muslim country, it's
02:38 10 because the embassy is on U.S. territory, technically; and then
11 second, any Muslims who were working there and died -- because,
12 as I mentioned earlier, the number of Muslims who died in the
13 bombing far exceeded Americans -- it was okay to kill them
14 because they were apostates. And they were apostates in the
15 mind of this questioner because they were actively assisting
16 the United States.

17 This notion that doing any kind of assistance to the
18 United States constitutes apostasy, again, I think is a core
19 doctrine of al Qa'ida and that -- and its supporters.

02:39 20 The reply suggests that that's not true; you can't be
21 so quick to assume that Muslims who worked in the U.S. Embassy
22 in Tanzania were apostates because the kind of loyalty or
23 assistance to the United States that is required before one
24 becomes an apostate has to be something really grave and
25 substantial, not necessarily something so simple as working in

1 the U.S. Embassy.

2 Q. And can you tell the jury what is the sort of concept of
3 Islamic law in theology around the issue of a Muslim being
4 killed?

5 A. It's strictly forbidden. It's a grievous sin that can
6 send one to hell.

7 Q. Now, I want to go back for a moment to -- I believe it's
8 Exhibit 420. Yes, 420. I think it's 420. Yes.

9 MS. BASSIL: If you could blow up that block? Thank
02:40 10 you.

11 Q. And are you familiar with this post contrasting Paul
12 Johnson?

13 A. Yes, I am.

14 Q. And can you explain -- first of all, the jury has seen
15 this post, I think, several times, in which Abu Sabaayaa
16 states, "In contrast to a man such as Paul Johnson who was
17 helping in the maintenance and repair of American Apache
18 helicopters, this is, to anyone who has sight with which they
19 can see or a brain with which they can think, a totally
02:40 20 different story."

21 Is this posting about Paul Johnson consistent with
22 al Qa'ida, inconsistent with al Qa'ida's position --

23 A. Well --

24 Q. -- first of all?

25 A. -- I think it's inconsistent.

1 Q. How so?

2 A. Because here it suggests that Paul Johnson, because of
3 what he is doing, he becomes potentially culpable, whereas
4 al Qa'ida's position is that you're culpable simply for being
5 an American.

6 Q. All right. And Paul Johnson -- what is your understanding
7 of what he did?

8 A. Is that he directly maintained weapons of war; namely,
9 Apaches. Apache attack helicopters.

02:41 10 Q. All right. And in terms of the posting, where does that
11 put Paul Johnson or what does that make him?

12 A. Well, the posting suggests that Paul Johnson fell on the
13 side of combatant from the perspective of Islamic law of war,
14 rather than non-combatants, which would be immune from
15 targeting.

16 MS. BASSIL: Now, if we could go back to the previous
17 post, page 66? All right.

18 Q. And going back to that, you said that this posting is
19 inconsistent with al Qa'ida?

02:42 20 A. Yes, it is.

21 Q. And can you describe this posting in terms of the view of
22 jihad, of its scope, compared to al Qa'ida?

23 A. Well, this isn't really about jihad or its scope; it's
24 about what kind of acts constitute apostasy. So every Muslim
25 agrees --

1 MR. CHAKRAVARTY: Your Honor, I think that answered
2 the question. Can't we have another question?

3 THE COURT: No, go ahead.

4 BY MS. BASSIL:

5 Q. How does it have to do with apostasy, and can you link
6 that up to the issue of jihad?

7 A. Yes, I can.

8 Q. Please do.

9 A. Every school of Islamic theology and law agrees that at a
02:42 10 certain point in time a Muslim can do actions that aid and abet
11 the enemy to such an extent that they abandon Islam, right?
12 Al Qa'ida takes sort of a strict liability view of this so that
13 any act that helps the Americans is sufficient to constitute
14 apostasy.

15 Now, what's significant about that from the
16 perspective of jihad -- because, as I said earlier, in Islam
17 it's absolutely forbidden for another Muslim to intentionally
18 kill another Muslim. Therefore, if you're going to kill
19 Muslims, you need to have a justification. A very strong
02:43 20 justification is to say, "Well, they're not Muslims; they're
21 apostates." So evidence of the fact that they're aiding and
22 abetting Americans is used by al Qa'ida to say, "Well, they're
23 apostates so we don't have to worry about killing them."

24 Q. I would like to turn to another sort of issue, or view of
25 al Qa'ida, or philosophy of al Qa'ida, and I'm going to refer

1 to it as "takfir." Are you familiar with that subject?

2 A. Yes, I am.

3 Q. And how are you familiar with that subject as it relates
4 to al Qa'ida?

5 A. Again, "takfir" means, basically, excommunication. It's
6 to declare somebody who claims to be a Muslim to be a
7 non-Muslim. And we touched on that with the previous exhibit
8 because what the question was suggesting, he was doing an act
9 of takfir. He was declaring that the Muslims who worked for
02:44 10 the U.S. Embassy in Tanzania had become non-Muslims by virtue
11 of their act of aiding and abetting the United States.

12 So takfir is a very important strategy that al Qa'ida
13 uses in its war because it expands the domain of legitimate
14 targets because they can say, "These people are apostates
15 because of their actions; so, therefore, we can attack them."

16 MS. BASSIL: And if we could have Exhibit 1255,
17 please, page 3?

18 THE COURT: Again, this is a --

19 MR. AUERHAHN: This is a new one.

02:45 20 THE COURT: A not-yet admitted exhibit?

21 MS. BASSIL: Yes, your Honor. I would ask to admit
22 this exhibit.

23 And if you could scroll --

24 MR. CHAKRAVARTY: Same objection.

25 THE COURT: All right. It will be admitted.

1 (Defense Exhibit No. 1255 received into evidence.)

2 MS. BASSIL: Could you scroll down, please? And go to
3 the last paragraph.

4 BY MS. BASSIL:

5 Q. Dr. Fadel, could you -- did you review this post?

6 A. Yes, I did.

7 Q. And did you find this last paragraph on page 3 to be
8 significant?

9 A. Yes, it is. It's very significant.

02:45 10 Q. Would you read it to the jury and explain this in
11 comparison to al Qa'ida's positions?

12 A. Okay. "As for declaring a specific person who does this
13 to be a Kaafir," non-Muslim, "this is a whole other topic of
14 discussion, as the rules and conditions for making takfir
15 muharibin," i.e., declaring an individual to be a disbeliever,
16 "are many, and it is not for ignoramuses like us to do this
17 without these very precise and specific conditions being
18 present and without us having in-depth knowledge and
19 understanding of the matter. And Allah," God, "knows best."

02:46 20 Q. So how would that -- how does that compare to al Qa'ida's
21 position?

22 A. Yes. As I mentioned earlier, al Qa'ida takes a very
23 strict view of the kinds of actions that can lead to one
24 becoming an apostate. So any kind of assistance to the
25 Americans, even without a subjective intent to be harming

1 Islam, in their view, counts as apostasy.

2 In this case what the poster is doing is laying out
3 theoretical conditions for what constitutes apostasy, but then
4 saying, "We are not capable of making a factual determination
5 with respect to any single Muslim whether or not, in fact, they
6 satisfy the conditions of apostasy." So it lays out the
7 theoretical rules but then says, "We are not in a position to
8 know whether or not an individual Muslim is an apostate." This
9 is very significant because it suggests that you can't use the
02:47 10 excuse of apostasy to target other Muslims.

11 Q. And does this -- does this have a basis in sort of Islamic
12 theological doctrine?

13 A. Yes, it does.

14 Q. Would you tell the jury what that is.

15 A. In many cases in Islamic theology, theologians are
16 concerned with articulating what the proper belief or doctrine
17 is or norm is. But then they are hesitant -- they express
18 reservations -- about making categorical judgments as to
19 whether or not specific people have satisfied the conditions --
02:47 20 the factual conditions that would require application of a
21 particular rule.

22 Q. And I would like to turn to another issue concerning
23 al Qa'ida which would be sort of -- I'll call it "participation
24 in non-Muslim lands." And by that I mean as citizens or
25 naturalized citizens, all right? Are you familiar with

1 al Qa'ida's position on that?

2 A. Yes, I am.

3 Q. And how are you familiar with it?

4 A. Again, through my reading and study.

5 Q. And what is al Qa'ida's position on Muslims participating
6 as citizens in non-Muslim lands?

7 MR. CHAKRAVARTY: Objection, your Honor. Limited to
8 the scope of the disclosure, and I don't see that anywhere.

9 (Pause.)

02:49 10 THE COURT: Let me see you at the side.

11 (Discussion at sidebar and out of the hearing of the
12 jury:)

13 THE COURT: I don't see it in the disclosure.

14 MS. BASSIL: Fine. I'll make it a subtopic of takfir,
15 which it is. It's a subtopic of takfir -- I just broke it
16 out -- and I'm happy to do that.

17 THE COURT: Okay.

18 (In open court:)

19 BY MS. BASSIL:

02:50 20 Q. Dr. Fadel, let me remove this as a separate topic and talk
21 about it in terms of takfir. Does al Qa'ida have a position
22 with respect to takfir and apostasy concerning participation in
23 non-Muslim lands?

24 MR. CHAKRAVARTY: Objection, your Honor.

25 THE COURT: Sustained.

1 BY MS. BASSIL:

2 Q. Does al Qa'ida -- when you were talking about apostasy and
3 al Qa'ida's position on apostasy, how does that reflect on
4 people being citizens in a place like America?

5 MR. CHAKRAVARTY: Objection, your Honor.

6 THE COURT: Sustained.

7 BY MS. BASSIL:

8 Q. Does al Qa'ida accept the idea that a Muslim can be an
9 American?

02:51 10 A. No.

11 Q. And how do you -- where -- how do you know that?

12 A. Because that would entail supporting the United States
13 through a minimum of taxation, so you would be culpable and you
14 could be killed. So you can't be a Muslim and be -- you can't
15 be a Muslim and an American at the same time, in al Qa'ida's
16 view, implicitly because if you're an American, you're a
17 legitimate target, but if you're a Muslim you can't be a
18 legitimate target. So it's an empty set, so to speak.

19 So if a Muslim claims to be a Muslim and an American,
02:51 20 you've got to resolve that contradiction one way or the other,
21 and I think under the 1998 fataawa it's resolved in the way
22 that's against Muslims; i.e., they can't be proper Muslims if
23 they are Americans.

24 MS. BASSIL: All right. And I would turn to Exhibit
25 1257, please, your Honor? And it would be page 2 and 3.

1 MR. CHAKRAVARTY: I object for -- to the topic of
2 this. I think it relates to the citizenship issue.

3 THE COURT: Sustained.

4 MS. BASSIL: Well, your Honor, I think -- may we be
5 heard at sidebar? I think Mr. Chakravarty is misrepresenting
6 this.

7 (Discussion at sidebar and out of the hearing of the
8 jury:)

9 MS. BASSIL: Your Honor, my notice says right here:
02:53 10 "Dr. Fadel will provide the jury with an understanding of many
11 of the defendant's writings and translations and" --

12 Could you guys stop, please.

13 -- "an understanding of their correct context" --

14 THE COURT: Where are you reading?

15 MS. BASSIL: I'm reading right here on the bottom of
16 page 12.

17 THE COURT: Okay.

18 MS. BASSIL: -- "and an understanding of their correct
19 context within the history and law of Islam."

02:53 20 And what I am asking him is about his writings and
21 translations -- particularly his writings here -- and his
22 understanding of their correct context. The history and law of
23 Islam includes what al Qa'ida is saying about these things.

24 THE COURT: Well, that disclosure does not bring in
25 the whole of Islam, I don't think. But at any rate, this

1 citizenship issue is identified in the disclosure with respect
2 to Dr. March, and he did testify about them, and that's
3 specifically identified here. So there are really two bases:
4 One is they're not disclosed specifically enough, which is the
5 basis for the objection; but I note in addition we've had it
6 through Dr. March. So it seems to be redundant.

7 MS. BASSIL: All right. Well, your Honor, I would
8 like to refer to -- if you'd look at -- this is the page 3 of
9 this. And what I really want to refer to is his issue of
02:54 10 admiration of America and what it's for and his view of
11 America; in other words, what he says in this is -- you have to
12 read the post.

13 (Pause.)

14 THE COURT: Whose admiration?

15 MS. BASSIL: Well, it goes back. It's actually a
16 person who put an American flag on his CD of the Qur'an.

17 (Pause.)

18 MS. BASSIL: It's just that paragraph that's got the
19 pink highlight.

02:55 20 MR. CHAKRAVARTY: What the defendant is saying about
21 what somebody else did in terms of his representation of
22 patriotism or love of America is not germane to any of the
23 issues that --

24 MR. CARNEY: It goes directly to the defendant's state
25 of mind.

1 MR. CHAKRAVARTY: It goes to what the defendant would
2 say --

3 THE COURT: No.

4 MS. BASSIL: It goes to his state of mind and it's
5 contrary to al Qa'ida.

6 THE COURT: You can have it.

7 MS. BASSIL: That's all I was going for. Thank you.

8 (In open court:)

9 BY MS. BASSIL:

02:55 10 Q. Dr. Fadel, are you familiar --

11 MS. BASSIL: Am I okay?

12 THE COURT: I think so.

13 BY MS. BASSIL:

14 Q. Dr. Fadel, are you familiar with this post?

15 A. Yes, I am.

16 Q. And this paragraph refers to someone who is expressing
17 some sort of support for America, correct?

18 A. A Muslim expressing some support for America, yes.

19 Q. All right. And was -- and was there an objection to this
02:56 20 by someone on the post?

21 A. Yes. I guess the person who started the thread believed
22 that that entailed an act of apostasy. The particular act was
23 putting a U.S. flag on top of the Qur'an.

24 Q. Okay. And what was -- what was the post by Abu Sabaayaa
25 and just that paragraph -- if you could read just that

1 paragraph and explain it in terms of al Qa'ida's position on
2 such acts or beliefs.

3 A. Yes. "You also have to ascertain exactly what is intended
4 by this apparent admiration of America. Is it for the good
5 things that it has to offer (the organization, the relative
6 ease of life, the fairness and general justice that is present
7 in such countries in comparison with the miserable situation of
8 the Arab world, et cetera)? If this is the case, this brother
9 is to be wisely taught how to manifest his wala' and bara', and
02:57 10 this is especially important and crucial since he seems to be
11 calling others to engage in his nonsense. But you cannot say
12 he is a kafir, a non-believer. If he loves America for the
13 kuffaar contained therein, this is a whole other story."

14 MR. CHAKRAVARTY: Your Honor, I rise just to -- there
15 were some Arabic terms there and they're not translated, and if
16 the witness can --

17 THE COURT: Yes. Yes. Wala' and bara'.

18 THE WITNESS: Oh, I'm sorry. "Wala'" means loyalty
19 and "bara'" means disavowal.

02:57 20 BY MS. BASSIL:

21 Q. Can you explain that?

22 A. Yes. Wala' means loyalty. The idea is that Muslims are
23 loyal to Islam and God and they disavow all others, right? And
24 so this is a theological concept whose details are a matter of
25 great dispute among all Muslims. But to a certain extent all

1 Muslims have to show loyalty, affection and love for Muslims
2 and have to separate themselves, to a certain extent, from
3 non-Muslims. And so the question is what's the proper dividing
4 line.

5 Q. And what does this post indicate to you concerning
6 al Qa'ida's position on apostasy -- or on America and apostasy?

7 A. Well, again, it's consistent with the idea that even the
8 simplest act of showing admiration for the United States
9 violates this basic theological premise of absolute loyalty to
02:58 10 the Muslim community. This post says, "No, you have to look at
11 it because loyalty is of different shades and degrees. Yes, at
12 some point in time a Muslim, if he's too excessive in his love
13 for America, could leave the folds of Islam, but not everything
14 that he does in respect of admiration of America constitutes an
15 act of apostasy."

16 So, again, it's a very careful kind of answer, and
17 what's important is that it negates the idea that you can
18 simply target Muslims who happen to be American citizens on the
19 assumption that they are apostates.

02:59 20 Q. I would like to turn to the subject of suicide actions, or
21 suicide bombings. Are you familiar with the legal and
22 theological view of such actions?

23 MS. BASSIL: We can take this down.

24 A. Yes, I am.

25 Q. And are you familiar with al Qa'ida's position on suicide

1 actions?

2 A. Yes, I am.

3 Q. And how are you familiar with al Qa'ida's position on
4 suicide actions?

5 A. Just through my reading and research.

6 Q. And can you -- and are suicide actions related to the
7 concept of martyrdom?

8 A. They are tangentially related. Yes, they are.

9 Q. First, can you explain the concept of martyrdom and its
03:00 10 meaning in Islamic theology, history and law?

11 A. Yes. Martyrdom, in Arabic, is called "shahada."

12 Q. I want to spell that.

13 A. Sorry.

14 Q. Hold on.

15 A. Do you want me to just spell it orally?

16 Q. I want to write it down. It helps me.

17 A. All right.

18 Q. All right. How do you spell that?

19 A. S-H-A-H-A-D-A.

03:00 20 Q. That means?

21 A. Witnessing.

22 Q. Witnessing?

23 A. Witnessing. Like what I'm doing today.

24 Q. And how does that come to mean martyrdom?

25 A. Because a martyr is somebody who dies witnessing to the

1 truth of Islam.

2 Q. Okay. And what does that -- can you explain that -- is
3 martyrdom unique to Islam?

4 A. The concept of martyrdom generically, I think, can be
5 found in a variety of different human cultures, including our
6 own.

7 Q. And where do you see it in our own?

8 A. Well, I think we see the fact that we award medals to
9 fallen soldiers for acts of heroism; we have a special
03:01 10 cemetery, Arlington National Cemetery, to honor our veterans;
11 we glorify fallen heroes; we memorize statements like "Give me
12 liberty or give me death," "I regret that I have but one life
13 to give for my country."

14 Q. Who said that?

15 A. Nathan Hill, I think, before he was hung by the British
16 during the Revolutionary War.

17 Q. Do other countries also have this concept of martyrdom?

18 A. I think if you do a little bit of reading, in ancient
19 Greek and ancient Roman literature which forms the basis of
03:01 20 Western civilization you will see in those cultures that they
21 honored their fallen warriors greatly and it was considered
22 virtuous to die for one's country.

23 Q. In Islam the honoring of martyrs, is that limited to
24 fighting?

25 A. No, it is not.

1 Q. All right. What is martyrdom in Islam? Who are martyrs?

2 A. Well, generally speaking, anybody who dies in a proper
3 state of faith, witnessing God, is considered a martyr. So the
4 prophet is reported to have said one time -- because he heard
5 people talking about martyrdom and they seemed to think that
6 you could only become a martyr by dying on the battlefield and
7 he said that was wrong. "Most of the martyrs in my community,"
8 meaning the Muslim community, "will die on their beds."

9 Q. And when did the recognition of martyrdom begin in Islam?

03:02 10 A. It began with the very earliest days of Islam because, as
11 I mentioned briefly earlier in the day, when the prophet
12 Mohammed began to preach Islam, they were subject to
13 persecution by the pagan Arabs at the time. Several early
14 Muslims were killed and were tortured to death, so the concept
15 of martyrdom arose very early in Islam as a way of recognizing
16 their sacrifices and that God would reward them for the
17 suffering that they underwent for the truth.

18 MS. BASSIL: Your Honor, I'm about to get into the
19 Islamic position on suicide, so...

03:03 20 THE COURT: Yeah, okay. We're at one o'clock. Let me
21 just see counsel for one minute.

22 (Discussion at sidebar and out of the hearing of the
23 jury:)

24 THE COURT: We're at the end of the week. I was just
25 wondering if there's something that I might say to the jurors

1 about where we are. Will I be able to tell them -- can I tell
2 them that the evidence will finish next week?

3 MS. BASSIL: I would love to -- well, let me say this,
4 your Honor: I probably have a half an hour more of him, okay?
5 I know that the crosses, quite frankly, have been
6 extraordinarily long. And then we have -- Sejal, can you help
7 me with this?

8 MS. PATEL: Brian Williams.

9 MS. BASSIL: Who is very short. We have three very
03:04 10 short experts who should all fit within a morning, all right,
11 without question, and that would be Brian Williams, the
12 linguist, who is about five minutes.

13 MS. PATEL: And Mark Spencer is a half-hour, tops.

14 MS. BASSIL: The tech guy.

15 And then the last big witness would be Marc Sageman.
16 And I think he's going to take two days, so --

17 THE COURT: I don't want to raise their hopes, but I
18 want to reassure them, if I can do that, because they are
19 getting a little nervous about the following week. I can also
03:04 20 say nothing.

21 MR. CARNEY: I would ask your Honor to consider saying
22 that we're actually making great progress toward the end of
23 this trial. To be candid, the decision of whether the
24 defendant will testify as a witness is his, and we've
25 emphasized that to him, and I'm not in a position to tell the

1 Court because I have not been told. So I can assure you that I
2 would like to get that issue resolved.

3 There's a limit as to how much I can talk here at the
4 sidebar on this subject.

5 THE COURT: That's fine. I wasn't actually thinking
6 that I would hear about that but --

7 MR. CARNEY: Well, I'm just --

8 THE COURT: I was thinking of the others.

9 MR. CARNEY: I didn't want you to think that it's
03:05 10 certain that we will rest after Sageman.

11 THE COURT: Fine. Fair enough.

12 MR. CARNEY: But he is the only --

13 THE COURT: But are there any other lay witnesses?

14 MR. CARNEY: Well, there is one other witness, and we
15 actually need to request a ruling from your Honor. There was
16 someone who's only in a position to testify by a audio -- by
17 videoconferencing from Saudi Arabia. He's the person --

18 THE COURT: That's the one that there's been an
19 exchange of briefing on?

03:06 20 MR. CARNEY: Yes, your Honor.

21 THE COURT: I agree with the government's view. I
22 think that the strong presumption -- and the rule -- is that
23 the testimony be taken in open court, which I take to mean
24 physical presence. Depositions are an exception on occasion,
25 but they're pre-approved and conditions are set for them. I

1 don't think it's appropriate to do it by videoconference.

2 MR. CARNEY: If I may just not only object to the
3 ruling, but I believe that the deposition mode is more often
4 applied to a situation where the government wants to present a
5 witness by videoconferencing because of the defendant's right
6 to have a face-to-face confrontation with a witness. If it's
7 the defendant attempting to secure testimony in this form,
8 there is no confrontation issue because the government doesn't
9 have a right for confrontation.

03:07 10 So if your Honor is making a definitive ruling that
11 under no circumstances can a defendant have a witness by audio
12 conferencing, then I'm going to object to that.

13 THE COURT: Well, I don't make it that broadly; I make
14 it that this defendant may not do it for this witness under
15 these circumstances having in mind -- I think it's Rule 26,
16 from memory, of the criminal rules.

17 MR. CARNEY: I just -- I thought the record should be
18 clear on what you're saying.

19 THE COURT: Fair enough.

03:07 20 MR. CARNEY: So with that, I don't believe there are
21 any other defense witnesses.

22 THE COURT: All right.

23 MR. CHAKRAVARTY: We have positions on the length and
24 who should be called which we can address outside of --

25 THE COURT: Yes. I know that.

1 MR. CHAKRAVARTY: I wouldn't go so far as to say what
2 your Honor is going to tell them, that we're making great
3 progress.

4 THE COURT: You don't think I could say that?

5 MR. CHAKRAVARTY: I don't think -- just because they
6 know it's been slow and I don't see -- but because we haven't
7 had a lot of the basis of what these witnesses' opinions are,
8 there's been zero discovery in terms of actual raw materials,
9 we are doing some of that discovery as we're doing our
03:08 10 cross-examination. You know, it's inelegant, it's not how we'd
11 prefer to do it, but we need to be able to do that -- like the
12 cross-examination, we need to be more proficient about it, but,
13 you know, part of that -- I don't know that that's going to go
14 away just because, you know, we want to finish the trial.
15 That's everyone's concern.

16 So predicting that we're going to, you know, bang
17 through three or four witnesses in the next four days, I think,
18 is optimistic. Everybody wants to do that, and we will do
19 whatever we can and maybe we could talk more about that, but I
03:09 20 think we've talked all we can and we've made multiple
21 disclosures --

22 THE COURT: Well, my own impression, even on the track
23 record that we've had, is that if that's the number and
24 identity of the witnesses -- putting aside the defendant
25 himself, which would be a different story, but the remaining

1 experts, and even having in mind the government's last couple
2 of crosses, because that reaches your point, I think -- I think
3 it's still probably within that estimate.

4 MR. CARNEY: May I ask the Court to consider asking
5 the government a question? They have some people in the
6 bullpen, and I wondered if the government is anticipating
7 calling, for example, Lorenzo Vidino as a rebuttal expert,
8 because that's going to be -- Kohlmann --

9 MR. CHAKRAVARTY: Vidino has always been there to kind
03:10 10 of police as far as Sageman goes. Sageman's disclosure, as far
11 as our understanding, is going to be tailored to basically
12 Kohlmann's kind of type of testimony; however -- and this we
13 can argue later, not while everyone is sitting here --
14 Mr. Groharing and I talked before, and we have serious concerns
15 about what the disclosure is, what the basis of his opinions
16 are with regards to that, not whether he can testify --

17 THE COURT: Who?

18 MR. CHAKRAVARTY: Sageman.

19 THE COURT: Right.

03:10 20 MR. CHAKRAVARTY: And that will help narrow --

21 THE COURT: Well, but one thing I said --

22 MR. CHAKRAVARTY: -- things and make us more
23 efficient.

24 THE COURT: But one thing I said earlier today will
25 apply to him, and that is, the October 18th is the operative

1 disclosure. There are some issues with that, perhaps, as well,
2 but not as many as the new matter that was presented in the
3 revised disclosure.

4 MR. CARNEY: I wondered if the government had anyone
5 else besides Vidino who's a possible --

6 THE COURT: If Vidino were to be called, can you
7 estimate how long he'd be?

8 MR. CHAKRAVARTY: It would be pure rebuttal, so it
9 would be if -- I guess a day. I should add, your Honor, when
03:11 10 Sageman testifies, to the extent Mr. Kohlmann is around and
11 available, he may come back to watch the testimony. We
12 wouldn't call both. It would be one or the another.

13 MS. BASSIL: Can we ask Mr. Kohlmann why
14 everyone -- no one appeared before Congress and everyone
15 submitted in writing and he misrepresented where he was?

16 THE COURT: Okay. Thank you.

17 (In open court:)

18 THE COURT: Jurors, I just was conferring to see how
19 we're doing, and we're doing okay in terms of the evidence.

03:11 20 (Laughter.)

21 THE COURT: It's impossible to make any precise
22 predictions but -- so I won't give you, you know, what I think
23 the remainder of the length of the trial will be, but it's
24 going along. I'll leave it at that and assure you that
25 we're -- I think we're in good shape. No promises, but we're

1 doing it, okay? So just as we broke for the weekend, I thought
2 it would be nice to try to give you a sense of that, okay?

3 So enjoy the weekend, we'll see you on Monday and
4 continue with the evidence.

5 THE CLERK: All rise for the Court and the jury. The
6 Court will be in recess.

7 (The jury exits the courtroom at 1:08 p.m.)

8 THE CLERK: Everyone can be seated. We're still in
9 session.

03:13 10 THE COURT: What do I have? Mr. Carney?

11 MR. CARNEY: Your Honor, I've submitted to the Court
12 two documents, and let me explain what they are. The first is
13 a transcript excerpt of Kareem Abuzahra's testimony. The
14 record would reflect it's Volume 25, pages 57 to 58. The
15 second document is an FBI 302 reflecting an interview by two
16 agents with Kareem Abuzahra. I have put a blue flag on the 302
17 paragraph that is relevant. It's a multipage document, and the
18 blue flag indicates the paragraph that I'm focused on;
19 similarly, I put a flag on the transcript -- to the portion I'm
03:14 20 referring to.

21 I know I alerted you to this yesterday. I'm not going
22 to simply belabor everything, but I think it's important enough
23 for me to ask your Honor to reconsider, and I would like to
24 just make certain points.

25 THE COURT: Go ahead.

1 MR. CARNEY: First of all, if you look at the
2 statement by Abuzahra in the 302, it is direct and unambiguous.
3 It states, "After September 11, 2001, Abuzahra understands why
4 some people have become prejudiced against Muslims. Abuzahra
5 has a prejudice against blacks and that is probably where he
6 gets his understanding." This statement is contained in a 302
7 that is attested to as accurate by two special agents of the
8 FBI.

9 The trial transcript that I gave your Honor is equally
03:15 10 unambiguous, I submit, because when I began talking about
11 this -- and the witness tries to duck it, at the top of page 58
12 I asked -- I broke it down and asked him specifically, "Did you
13 say to the FBI after September 11, 2001, you understand why
14 some people have become prejudiced against Muslims?"

15 "ANSWER: Yes.

16 "QUESTION: And did you then say, 'I have been
17 prejudiced against blacks and that's probably where I get that
18 understanding'?"

19 "ANSWER: No."

03:16 20 As your Honor can see, I'm trying to quote as
21 carefully as I can the statement in the 302 and the -- and put
22 it into the -- as direct a question as I could to the witness.

23 The inconsistency between the 302 and the witness's
24 trial testimony goes directly to the witness's credibility.
25 With respect, I nonetheless do not accept the representations

1 by the two agents who wrote that report that they misunderstood
2 Kareem. I don't accept that representation.

3 I believe that I can get that report in as a prior
4 recorded statement under the rules of criminal procedure; in
5 other words, I can show that at the time the report was written
6 it was very close in time to the date that Mr. Abuzahra made
7 this statement. Indeed, if one looks at the report, it's the
8 day after. I believe I can show that the agents reviewed this
9 report, and at the time they signed and submitted this report
03:17 10 they believed everything in it was true.

11 If so, I submit it's admissible as a prior recorded
12 statement of these agents and, therefore, it is as admissible
13 to impeach Kareem as it would be if the agents took the stand
14 and testified to what's in this report.

15 The failure to allow me to introduce this evidence
16 permits this lie by Kareem at trial to go unimpeached. Such a
17 lie goes directly to his credibility. The refusal to permit me
18 to show the prior inconsistent statement also has the effect in
19 this case of affecting my credibility, because to ask a witness
03:18 20 a question as I did, that is, as potentially devastating to his
21 credibility without having a firm basis for asking it, would be
22 viewed or could be viewed by the jurors as really a sleazy
23 tactic on my part, that I wanted to imply that Abuzahra has
24 prejudice against blacks simply to diminish him in the eyes of
25 the jury and that I have no good-faith basis to ask the

1 questions.

2 It's not about disparaging Abuzahra because of his
3 character in terms of his beliefs. I mean, I note that you've
4 let the prosecution introduce evidence that my client made
5 disparaging comments about Christians, about Jews, about gays,
6 about American soldiers and about women to show his state of
7 mind. My purpose for introducing this prior inconsistent
8 statement of Kareem is going directly to his truthfulness and
9 his credibility.

03:19 10 Kareem Abuzahra, I submit, is the most important
11 witness in the government's case. His credibility is central
12 to the government's burden of proof, and it becomes central,
13 therefore, to the defendant's right to have a trial -- a fair
14 trial. And that right to a fair trial should allow me to
15 impeach Abuzahra about a direct lie that he told under oath at
16 this trial.

17 And I would ask your Honor to reconsider and allow me
18 to call these special agents so that I can lay the foundation
19 for the introduction of a prior recorded statement, if not,
03:19 20 having them acknowledge that Kareem told them the direct
21 opposite of what he stated in the courtroom.

22 THE COURT: Mr. Auerhahn?

23 MR. AUERHAHN: Thank you, your Honor.

24 First of all, this is a collateral matter and the
25 defense should not be allowed to put on a witness concerning a

1 collateral matter. Second of all, in focusing exactly on the
2 302 and the testimony, the 302 doesn't say that Mr. Abuzahra
3 said he was prejudiced against blacks; it says he has a
4 prejudice against blacks. It's not in quotes.

5 And I have the utmost respect for Mr. Carney's
6 abilities as well as his credibility, but he made a strategic
7 mistake when he asked a specific question as if it were in
8 quotes when it's not in a 302.

9 The witness described -- gave an example, and from
03:20 10 that example the agents drew a conclusion. And this statement
11 about his prejudice is a conclusion. It's not in quotes; it's
12 not what he said. And then when Mr. Carney chose to ask him
13 about it, the witness's answer at the bottom of page 57 was, "I
14 don't believe it was phrased like that, no." And then
15 Mr. Carney pressed him, including in quotes, "'I have a
16 prejudice against blacks.' Did you say that?" And he said no.
17 And that is absolutely, positively true. He never mouthed
18 those words.

19 As a matter of fact, when Mr. Carney pressed him
03:21 20 again, "You didn't say that to the FBI?" he said, "I don't
21 believe I said it like that. If you want, I can explain. Or
22 if you want me to just say no, then no." He tried to explain
23 that it was not an accurate direct quote, but Mr. Carney
24 decided he didn't want that. He didn't want to get to the
25 truth of whatever Mr. Abuzahra had said and what conclusions

1 the agents had drawn from that.

2 So if he puts the agents on the stand, he's going to
3 be impeaching the agents with the way in which they wrote the
4 302 and not Mr. Abuzahra concerning what it is he testified to
5 during this trial. And that clearly is not a proper reason to
6 put those witnesses on the stand, to try to, through the back
7 door, throw some dirt at Mr. Abuzahra when, in truth, as
8 Mr. Carney has been arguing, he's impeaching the agents and the
9 manner in which they wrote the report.

03:22 10 But Abuzahra's testimony was absolutely truthful and
11 it was the way in which Mr. Carney chose to ask a question that
12 made it truthful, and he tried to explain but was not given the
13 chance.

14 MR. CARNEY: Your Honor, after asking Mr. Abuzahra,
15 "Did you make the following statement," and I said, "quote/end
16 quote," I then gave him another opportunity. And I direct your
17 Honor to lines 13, 14 and 15.

18 "QUESTION: I want you to answer this question: Did
19 you say to the FBI that you have a prejudice against blacks?

03:23 20 "ANSWER: I don't believe I did, no."

21 So that took it out of the realm of a quotation but
22 into the realm of "Did you say you have a prejudice against
23 blacks?" The FBI report says "Abuzahra has a prejudice against
24 blacks." That's not in quotation marks. Neither is any
25 statement by Abuzahra in this entire report in quotation marks

1 and, indeed, it's rare in a 302 that there would ever appear
2 quotation marks.

3 I think that it's splitting hairs in a manner that's
4 not reflected in the rules of evidence that permit a defendant
5 to show that a witness made a prior inconsistent statement by
6 what it says, what it fails to say, or that it's different from
7 what a witness said on a prior occasion. The only way I can
8 show this is by presenting these officers, and it's probably
9 one of the most bread-and-butter techniques used in every
03:24 10 criminal trial. And I would urge the Court to reconsider.

11 THE COURT: When we argued -- when it was argued
12 yesterday, the substance of the testimony and the 302 were
13 referred to, and the transcript now of each -- or the
14 transcript on the copy of the 302 are substantially similar to
15 what was argued yesterday. Providing the actual text does not
16 really alter the considerations that I had yesterday when I
17 ruled on the matter, and I adhere to the ruling.

18 Let me just say in addition to the ambiguity about
19 whether it was inconsistent and so on, and the question of
03:24 20 whether a couple of steps removed it could come in as a
21 recorded statement of the agents, I would also point out that
22 the underlying question whether he has a prejudice against
23 blacks is an irrelevant question for this case. There might be
24 cases where that is a highly relevant matter, but there's no --
25 prejudice against a particular group that is not a group at

1 issue in the case seems to me to have no evidentiary value
2 except really casting aspersions on the witness.

3 So the probative value of the original question is
4 practically nil, if not nil, and so this contretemps about
5 whether it was true or not is also a very minor and collateral
6 matter. So under Rule 403 I would exclude the evidence, as I
7 said yesterday.

8 MR. CARNEY: I would just add a footnote, then, if I
9 may? I note that the government did not object to the question
03:25 10 as being irrelevant.

11 THE COURT: I note that.

12 MR. CARNEY: And I am offering the evidence because
13 under oath he told a lie to the jury --

14 THE COURT: Okay.

15 MR. CARNEY: -- in response to a direct question by
16 me.

17 That's what the significance is. I don't care what he
18 says on the stand. If he's asked a direct question and he
19 intentionally lies about it, then the jury should hear it.

03:26 20 THE COURT: We could go on forever. I would just say
21 that he did try to explain it and was not -- legitimately, was
22 held within the bounds of the particular question.

23 At any rate, if you want these somehow identified for
24 the record, figure out a way to do it.

25 MR. CARNEY: Yes, your Honor. I will.

1 MR. CHAKRAVARTY: Your Honor, not to belabor this
2 issue, if we could take just a few moments at the end of the
3 week to talk a little bit about -- to elaborate on our
4 conversation we had at side with regard to witnesses for
5 next --

6 THE COURT: Yes, go ahead.

7 MR. CHAKRAVARTY: The government's position is that
8 the schedule of witnesses after Dr. Fadel -- he's still in the
9 courtroom -- there's, I think, a Dr. Williams, who the
03:27 10 government objects to his testimony in toto; and then
11 Dr. Sageman who the government does not challenge his
12 qualifications with regards to *Daubert*, but the scope, as we
13 articulated before, we think needs to be specifically narrowed.

14 And while your Honor has given, I think, clear
15 guidelines in terms of the general subject matter area, which
16 is fair game, the frustration that the government has in
17 preparing for its cross-examinations has been that while we
18 have been notified of subject matters about which the witnesses
19 would be testifying, the underlying bases for their opinions
03:27 20 and what they relied upon in their research, that has been
21 sorely lacking. And what that has yielded is both a probing
22 cross-examination where we're attempting to establish the basis
23 of knowledge that the witness may have. That takes up a lot of
24 time, obviously. It's boring. It's not necessarily probative
25 or -- the probative value is not necessarily apparent when it's

1 being done so it's, frankly, inefficient.

2 But where we're being prejudiced by that phenomena I
3 think has been shown by some of the witnesses who have preceded
4 Dr. Fadel, although I trust with Dr. Fadel that will not
5 happen. I will try to make sure that doesn't happen. But when
6 it was clear that the witnesses are preparing writings, they've
7 been given materials by the defense which we don't know what
8 those materials are, so we have no way to challenge the
9 credibility or "You saw this but did you see this post," we
03:28 10 have no way of kind of drawing that contrast, and underlying
11 learned treatises or other kind of research materials that they
12 have relied upon, including Dr. Fadel, the defendant revealed
13 today, prior courtroom testimony, none of that type of
14 information has been produced. So that we can't be precise in
15 terms of drawing contrasting either substantive impeachment or
16 bias impeachment or prior inconsistent statements about the
17 nature of what they're going to be testifying to.

18 With Dr. Sageman this comes to a head because he has
19 been in the field generally of terrorism and its variety of
03:29 20 incarnations for, I think Ms. Bassil has talked about, over 30
21 years, and who she describes as the foremost expert in this
22 area. With that kind of a broad range of expertise, the fact
23 that he's written a lot about the subject, we have no basis to
24 conclude what he is relying on in order to come up with the
25 relevant conclusions in this case.

1 You know, there are scholars such as Dr. Fadel who
2 have been studying areas for a long period of time. And while
3 there's very little question that there's an interrelationship
4 and in the course of their study they'll find some document
5 that might be relevant, it's much less clear that attorneys who
6 are preparing to do a cross-examination using disclosures under
7 703 and Rule 16, and I should add 26.2, where writings,
8 statements, reports, what -- they're the synthesis of their
9 vast experience and applying it to the case is precisely why we
03:30 10 need that discovery and why we have produced that discovery to
11 the defense.

12 And this isn't -- this is where, you know, I stood up
13 yesterday to talk about the asymmetry. This is a case where
14 the whole point of an expert witness is -- this is not, you
15 know, trial by ambush. We have experts, they have experts, the
16 battle of the experts, and then let the jury decide who they
17 find credible or where the differences are.

18 In this circumstance where we don't have the bases of
19 opinion, we're really handcuffed in doing that. And, you know,
03:30 20 we tolerate, that's the nature of the business, but that's
21 what's impeding the government's ability to be more precise and
22 focused in terms of how its cross-examination is going to go.

23 And I mentioned 26.2. Both Dr. March, as well as
24 Mr. Johnsen, referred to notes and other things that they have
25 prepared in the course of their preparation. Obviously,

1 they're scholars. It stands to reason that they would prepare
2 that. I haven't yet had the opportunity to ask Dr. Fadel the
3 same question. But that's the type of material that
4 customarily -- certainly the government would produce. And
5 Rule 26.2 doesn't discriminate.

6 This isn't a case where, as a strategic matter, the
7 defense can actively, you know, cry willful blindness or claim
8 not to have custody or control of something for which they have
9 contracted an expert for a specific task. We're not asking for
03:31 10 his thesis dissertation notes; we're asking for what you
11 prepared in preparation for this trial.

12 It's that kind of stuff which we don't have and we're
13 entitled to. And we understand that that would allow us to be
14 armed more for cross-examination, and that's the purpose for
15 the rule. We understand that right doesn't emerge until direct
16 examination, you know -- it's classic *Jencks* -- even though we
17 customarily produce early so that we can be refined. We're
18 asking for that now. And we have in the past, and we're again
19 asking for that, especially with regards to Dr. Sageman because
03:32 20 the risk there is he's going to be a long witness in any event.
21 We don't want him to be longer than necessary and we don't want
22 to keep going to the sidebar every time that we think there's a
23 question either beyond the scope or without a sufficient
24 foundation. The more we get now, the more we can streamline
25 whatever the cross is.

1 MS. BASSIL: Your Honor, I think the government fails
2 to understand how one prepares to cross-examine an expert
3 witness. And in the 33 years I've been doing it, I get their
4 writings, I look -- now you look on the internet, you see what
5 they've said, and you prepare your cross-examination. Our
6 experts have been given discovery provided by the government.
7 Nothing else and nothing more.

8 Now, they have areas of expertise. They know their
9 areas. They have read things. The government is well aware,
03:33 10 and I cite it in that first disclosure, that Dr. Sageman did a
11 study, that he's been -- you know, that he's relying on his
12 field of study. They have his books. If I were to disclose
13 more, I would give them his book. They already have it.

14 The fact is that disclosing underlying learned
15 treatises, it's my understanding, is only if you want to put
16 the learned treatise in. Dr. Fadel, for example, talked about
17 medieval Islamic theology. This is what he studies. We didn't
18 have to turn over every medieval Islamic theology book that he
19 studied.

03:33 20 In the same way Dr. Sageman -- yes, he's been studying
21 this for a long time. He has a library where he studies all
22 kinds of political movements. And these don't necessarily form
23 his opinion, but they certainly form his expertise. You know,
24 everything you read kind of confirms what you're thinking or
25 maybe makes you discard what you've been thinking.

1 But the fact is that the government has been given
2 notice of Dr. Sageman, and the fact that his studies are
3 published really gives them a greater advantage than you would
4 in any other expert.

5 We did not have Mr. Kohlmann's notes. We had his
6 report which, quite frankly, although he might have cited to an
7 instant message here or there, was long on sweeping
8 generalizations and very short on specific bases. And I
9 don't -- your Honor, we've given them notice. The rule really
03:34 10 does not require any more. And the discovery we've given these
11 experts has been the discovery from the government. And, in
12 addition, Dr. Sageman has been reading the transcripts of the
13 trial testimony, and that's really about it.

14 He hasn't given us anything more; we haven't given him
15 anything more. You know, I can tell you that I was thinking of
16 giving the government -- a RAND report came out yesterday. I
17 don't know if he's going to reference it or not. If he is
18 going to, I will give them a copy of it. But other than that,
19 what he's really testifying to is the history of terrorism, all
03:35 20 right -- and, you know, Mr. Kohlmann did not put out a basis
21 for his knowledge of al Qa'ida; he gave a sweeping history.
22 Mr. Sageman -- Dr. Sageman will testify to that. Some of that
23 is just personal knowledge, in fact, because he was actually
24 there.

25 He will -- and he will testify to his methodology.

1 And the government is well aware of this. They're well aware
2 that Chapter 1 of his last book talks about the methodology of
3 studying terrorism. You know, if they want me to make a copy
4 of that chapter, I'm happy to do it. But, you know, this is
5 not in the dark. This is not unknown. And, you know, it's all
6 out there. We gave them our -- we gave them the CDs. It
7 includes the bibliographies. It's all out there.

8 THE COURT: Do you have any statements that would
9 qualify under Rule 26.2 as *Jencks* material?

03:36 10 MS. BASSIL: I really -- I'm not clear what they're
11 referring to by that, quite obviously.

12 THE COURT: Well, so you often get a report or a
13 summary from the witness as to what he's going to opine.

14 MS. BASSIL: Well --

15 THE COURT: Are there communications from the
16 witnesses as to what they would say?

17 MS. BASSIL: No. I mean, we've had emails about
18 meeting, and when we're going to meet, and so forth and so on.
19 What I try to do -- and you don't want to allow this latest
03:36 20 disclosure -- was I tried to reflect, based on Mr. Kohlmann,
21 you know, sort of -- you know, we have always said that
22 Dr. Sageman's testimony was dependent on what Mr. Kohlmann
23 said, all right? Partly because there was this issue of
24 profiling, and that I did exclude it after Mr. Kohlmann
25 testified. I am not aware of any rule that prohibits an expert

1 from testifying to matters within his expertise. I don't --

2 THE COURT: I'm focusing on whether you have anything
3 that summarizes all or part of his opinions that would qualify
4 as *Jencks* material.

5 MS. BASSIL: I will have to look at that, your Honor.
6 I would have to look at the emails and just make a decision
7 about that. But we also -- frankly, your Honor -- I'd have to
8 look at that, your Honor, and I really don't want to make a
9 commitment to that because I also, quite frankly, want to
03:37 10 research the issue of work product and I'm not prepared to
11 argue that today.

12 THE COURT: Well, I think the rule is fairly clear as
13 to what has to be disclosed.

14 MR. AUERHAHN: Your Honor, I just want to make a
15 point. Like, for example, yesterday when Mr. Johnsen testified
16 he had notes. We never got those notes. He talked about
17 reports that he had access to. We never got those reports.
18 And we should have gotten both of those under the reciprocal
19 discovery rules.

03:38 20 MS. BASSIL: We had no reports from Mr. Johnsen, your
21 Honor.

22 MR. AUERHAHN: But he had notes and we should have
23 gotten those.

24 THE COURT: Yeah. They don't have to have been
25 delivered, actually, because obviously the government has to

1 inquire of law enforcement agencies whether they have any
2 relevant materials, whether or not they've been communicated to
3 the government. That's one of the obligations they have under
4 *Brady* and other things. But anyway --

5 MS. BASSIL: We received no notes from Mr. Kohlmann.

6 THE COURT: -- I think some exploration of whether
7 there are statements within the scope of Rule 26.2 is an
8 appropriate inquiry, whether or not it was in the form of a
9 communication.

03:38 10 MS. BASSIL: Right. We received no notes from
11 Mr. Kohlmann.

12 THE COURT: The "received" part may be irrelevant.

13 MS. BASSIL: I don't understand. They're asking for
14 notes, and we didn't get any notes.

15 THE COURT: No. No. But the statement, for purposes
16 of Rule 26.2, according to the rule, is a written statement the
17 witness makes or signs or otherwise adopts or approves. It
18 doesn't say, "and is communicated to the attorney," for
19 example.

03:39 20 MS. BASSIL: I see what you're saying, your Honor.
21 All right. I would have to look. I would have to look. I
22 really would.

23 THE COURT: Okay.

24 MR. GROHARING: I don't want to belabor the point with
25 Dr. Sageman, your Honor, but I do want to make some points

1 about disclosure. The information that he -- defense claims
2 he's -- excuse me -- relying upon is very, very broad, and
3 here's just a couple of examples. Data collection from court
4 cases. There's no indication of which court cases he's relying
5 upon. Interviews, generally. There's no indication of
6 interviews of whom. Knowledge of individuals who fought in the
7 Afghan-Soviet war and the Afghan Civil War. There's no
8 indication of who these individuals are. Generally,
9 open-source material, then material from al-Jazeera. No
03:39 10 indication of what material in particular from al-Jazeera.
11 News reports. Again, no indication of what news reports.

12 And he says -- the defense says reliance, studies and
13 research by other established scholars in related fields of
14 Middle Eastern studies, Islamic studies and terrorism studies.
15 There's no indication of what any of these studies or research
16 are.

17 THE COURT: What are you reading from?

18 MR. GROHARING: These are my notes, your Honor, that I
19 made from the defense disclosure.

03:40 20 THE COURT: Oh, your notes? All right. I see.

21 MR. GROHARING: There's also an indication that he
22 worked on a few-year study of terrorists funded by the United
23 States Air Force Research Laboratories. My understanding is
24 that's a classified study. We don't -- we haven't had --

25 THE COURT: Well, if you're referring to the revised

1 report, which I think that at least is in, that's not the
2 reference.

3 MR. GROHARING: That was both reports.

4 THE COURT: Is that in both? The Air Force --

5 MR. GROHARING: The Air Force study has been
6 consistent in each of the disclosures.

7 THE COURT: I thought that was new. Anyway --

8 MS. BASSIL: Your Honor, Mr. Kohlmann referred to open
9 sources. We didn't know what the open sources were. He
03:41 10 started talking about studying 120 people who said they were
11 leaving and 65 were dead. We had no idea what he was talking
12 about or what study or where that came from. He was quoting
13 al-Jazeera. He was quoting all kinds of things. These weren't
14 in his reports, nor were they anything but open sources.

15 THE COURT: Okay. Well, I think we have to have a
16 longer attention to this Sageman issue. I want to get
17 through -- he's not until after the --

18 MS. BASSIL: He's the last witness.

19 THE COURT: Well, what you had previously
03:41 20 characterized as three relatively short witnesses, so I think
21 we have some time to do that. And it may be that we can find
22 some time Monday afternoon to do that. I'm not sure. I just
23 looked. We have a bunch of things on Monday afternoon. But
24 maybe we could have some time as well. I don't know.

25 MR. GROHARING: The concern, your Honor, is obviously

1 this is voluminous material that we don't even know what it is
2 yet. We're probably talking about hundreds, if not thousands,
3 of pages of material that we're going to have to digest the
4 night before he testifies if we were to want to even start to
5 review the material he's relying upon.

6 MS. BASSIL: Well, yes, there's thousands of pages of
7 discovery. We've mastered them. I assume you have.

8 MR. GROHARING: We didn't provide it the night before
9 trial.

03:42 10 MS. BASSIL: This is the government's discovery I'm
11 talking about. That's what I'm talking about. That's what he
12 got. And we did get it three days before trial.

13 THE COURT: I think we've gone as far as we can today,
14 but we will address it sometime, necessarily, before he
15 testifies.

16 THE CLERK: All rise for the Court. Court is in
17 recess.

18 (The Court exits the courtroom and the proceedings
19 adjourned at 1:38 p.m.)
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C E R T I F I C A T E

We, Marcia G. Patrisso, RMR, CRR, and Cheryl Dahlstrom, RMR, CRR, Official Reporters of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of our skill and ability, a true and accurate transcription of our stenotype notes taken in the matter of Criminal Action No. 09-10017-GAO-1, United States of America v. Tarek Mehanna.

/s/ Marcia G. Patrisso
MARCIA G. PATRISSE, RMR, CRR
Official Court Reporter

/s/ Cheryl Dahlstrom
CHERYL DAHLSTROM, RMR, CRR
Official Court Reporter

Date: December 9, 2011